SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION AND REALTY ASSOCIATES, INC., PETITIONERS,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1935.

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UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

1

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, FRED L. GROSS, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman,
Appellees.

2

FRED L. GROSS, Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman,
Appellees.

3

(Consolidated Appeals.)

Statement Under the Rule.

These are appeals as of right and by permission from certain parts of an order of the United States District Court, for the Eastern District

of New York, made by District Judge Clarence G. Galston on April 6, 1934, confirming the composition in bankruptcy offered by Realty Associates Securities Corporation. The appeals are separately taken by Eugene F. O'Connor, Jr., Referee, from so much of said order as fixes his statutory commissions as referee in bankruptcy in the said proceeding at the sum of $24,064.87, and by Fred L. Gross, Receiver, from so much of said order as fixes his commissions as receiver in bankruptcy in the said proceeding at the sum of $28,877.84, and also in so far as said order fails adequately to protect Fred L. Gross, as receiver, with regard to any and all liability for federal and state taxes.

This proceeding was commenced by the filing of a voluntary petition in bankruptcy on July 10, 1933 by Realty Associates Securities Corporation, which was adjudicated a bankrupt on the same day by order of District Judge Marcus B. Campbell, on which date the matter was referred to Eugene F. O'Connor, Jr., as referee in bankruptcy, to take proper proceedings under the National Bankruptcy Act. Fred L. Gross and Frank Fox were duly appointed receivers by order of the District Court dated July 10, 1933 and thereupon duly qualified by filing the required bond.

Frank Fox withdrew and resigned as such receiver, with the permission of the Court, on January 4, 1934.

The bankrupt filed an offer of composition on the 26th day of October, 1933. This composition offer was in all respects accepted by the majority in number of all the creditors whose claims had been allowed and whose claims constituted a majority in amount. The referee filed a report on the said offer on the 27th day of November, 1933,

approving same and recommending the composition for confirmation. By order dated January 5, 1934, District Judge Marcus B. Campbell denied the application for confirmation of the said order of composition on the ground that the court could not confirm same with the agreement contained therein to pay compensation and expenses to certain bondholders' committees and their attorneys, and returned the matter to the Referee to ascertain and report in the usual manner whether a majority in number and amount of the creditors, whose claims had been allowed, would accept the composition with said agreement eliminated therefrom and with modification of other terms of the offer, if any, which the bankrupt might propose. Upon an appeal to this Court, the said order was affirmed. See *In re Realty Associates Securities Corporation*, 69 F. (2d) 41.

The bankrupt modified the said offer of composition by an instrument dated February 16, 1934, so as to eliminate therefrom the provisions for payments to bondholders' committees and their attorneys. The offer of composition as so modified came on for consideration by creditors on February 28th, 1934, and was accepted by a majority in number and amount of creditors whose claims had been allowed, and the composition was recommended for confirmation by the referee. An application for confirmation of the composition as modified came on to be heard on March 23, 1934, and an order was entered by District Judge Clarence G. Galston on April 6, 1934, in all respects confirming the composition as modified, and from the parts of the said order as above set forth the appeals herein are taken.

The following parties are appellees: Realty As-

sociates Securities Corporation, Bankrupt; Fred L. Gross, Receiver (in the appeal of Eugene F. O'Connor, Jr., only); Homer E. Palmer, Charles Gidanski and Solomon Noveck, Creditors; Almon G. Rasquin, Collector of Internal Revenue; Eliza B. Carman, individually and as Executrix of Mary H. Carman, deceased, Creditors; Bondholders' Committee of which William E. Kennedy, Jr., is Chairman, Creditors; Realty Associates, Inc., Creditor; Manufacturers Trust Company, Creditor, and Trustee under Indenture; Bondholders' Committee of which Frederick S. Robinson is Chairman, Creditors.

There has been no change in parties since the commencement of this proceeding.

No question was referred to any commissioner or commissioners, master or referee, except as herein stated.

The order appealed from was entered on April 6, 1934. The appeal of Eugene F. O'Connor, Jr., referee herein, was allowed by District Judge Galston on April 13, 1934, and the appeal of Fred L. Gross, receiver, was allowed by the same judge on April 12, 1934. Permission to appeal was granted to both Eugene F. O'Connor, Jr., referee, and Fred L. Gross, receiver, by this Court by orders dated April 26, 1934.

By orders of this court dated May 2nd, 1934 and April 30th, 1934, the said appeals of each appellant respectively were consolidated. By order dated May 4th, 1934, the consolidated appeals of each appellant were further consolidated, with provision for the hearing of all of said appeals on one record.

Mr. Fred L. Gross was named as an appellee in the appeal by Eugene F. O'Connor, Jr., Referee,

solely because he was present at and took part 13
in the hearing before the District Judge on the confirmation of the composition, but all parties agree that Mr. Fred L. Gross has no interest in the outcome of the appeal by Eugene F. O'Connor, Jr., as Referee.

Voluntary Petition.

The voluntary petition in bankruptcy filed July 10, 1933, recites among other things the following:

14

That the bankrupt is a New York corporation, the owner of real estate some of which has been sold by it under installment contracts of sale still executory and also is the owner of mortgages upon parcels of real estate and has advanced monies upon the security of real estate mortgages.

That its liabilities are approximately $12,500,000 and the assets consisting of cash, marketable securities, real estate, installment contracts for the sale of real estate, and first and second mortgages are of an approximate present market value of $10,000,000.

The corporate resolution adopted before the 15
execution of the voluntary petition, and attached to it recites in part that the proceedings are taken "with a view to the offering of a composition in bankruptcy to its creditors."

The assets referred to in the voluntary petition, as shown by the Receivers' inventory dated July 10, 1933, were made up as follows:

I. Realizable assets:

(a) Cash in banks $973,193.91

16	(b) Investment securities, at cost	2,351,918.81
	(c) Notes receivable	6,183.00
	II. Non-liquid assets:	
	(a) Equity in real estate on basis of book value after allowing for $1,220,850 of mortgages payable	$699,105.67
17	(b) Mortgages on real estate (consisting of approximately $4,000,000 of first mortgages and $5,500,000 of second mortgages), taken at face value plus accrued interest	9,674,620.62
	(c) Installment contracts for purchase of real estate, taken at book value (representing the excess of the total amount payable on such contracts over the total amount of all prior liens)	2,633,490.58

18 NOTE: Neither the voluntary petition, the Receivers' inventory, nor the schedules in bankruptcy were introduced or referred to before the District Court by any of the parties.

Excerpts from Schedules in Bankruptcy.

SUMMARY OF DEBTS AND ASSETS 19

(from the statements of the bankrupt in Schedules A and B)

Schedule A	1 (1)	Taxes and debts due United States	$ 975.30
Schedule A	1 (2)	Taxes due States, counties, districts and municipalities	14,718.80
*Schedule A	3	Unsecured claims	12,635,566.46
		Schedule A, total	$12,651,260.56
Schedule B	1	Real Estate	$ 699,103.67
Schedule B	2-b	Bills, promissory notes and securities	9,930,881.78
Schedule B	3-a	Debts due on open accounts	2,721,186.55 20
Schedule B	3-b	Stocks, negotiable bonds, &c.	2,408,790.43
Schedule B	3-c	Deposits of money in banks and elsewhere	973,193.91
		Schedule B, total	$16,733,158.34

Note: This total ($16,733,158.34) is based on book value of real estate and face value of mortgages and installment contracts and not on present market values.

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†

*SCHEDULE A 3—CREDITORS WHOSE CLAIMS ARE UNSECURED.

Accounts Payable—per attached schedules	$	3,616.79
Bondholders " " "		12,631,949.67
Total		$12,635,566.46

REALTY ASSOCIATES SECURITIES CORPORATION,
Petitioner,
By C. D. OSBURN,
Secretary.

† This is part of a separate page of the schedules.

Instrument, Dated February 16, 1934, Modifying Offer of Composition, Dated October 26, 1933.

22

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

23

Realty Associates Securities Corporation, a New York corporation, having heretofore offered terms of composition to its creditors by offer of composition dated October 26, 1933, does hereby modify said terms of composition, pursuant to the order of the United States District Court for the Eastern District of New York entered January 5, 1934, and affirmed by the Circuit Court of Appeals on February 13, 1934, by eliminating therefrom the provision for payment of compensation and expenses of bondholders' committees and fees and disbursements of their respective counsel including counsel for Manufacturers Trust Company, so as to make said offer read as follows:

24

REALTY ASSOCIATES SECURITIES CORPORATION, a New York corporation (hereinafter sometimes referred to as "the Company"), having heretofore filed a voluntary petition in bankruptcy, having been examined at a meeting of its creditors and having filed in this Court the schedule of its property and list of its creditors required to be filed by bankrupts, does hereby offer to its creditors, terms of composition as follows:

Modified Offer of Composition.

1. All debts which have priority shall be paid in full. 25

2. The Company agrees to pay all expenses of administration, and of the composition.

3. The amount to be paid to all creditors whose claims are based on presently outstanding bonds of Realty Associates Securities Corporation, and whose claims have either been filed or allowed or are included in the schedules filed by the bankrupt (claims of such creditors to be stated as of July 10, 1933), shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed or if 26 not filed and allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein. The remaining eighty-five per cent. (85%) of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided.

The amounts of any coupons due prior to April 1, 1933, which are or were attached to the presently outstanding bonds of the Company shall not be included in the computation of any claim for 27 the purposes of this composition, but such coupons shall be paid in full from the sums heretofore deposited with the respective paying agents.

4. Such payment of such 15% shall be made to creditors whose claims are based on presently outstanding bonds issued under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively (1) July 1, 1925, (2) December

1, 1927 and (3) October 1, 1928, only upon and against presentation of all such presently outstanding bonds (with all coupons due subsequent to March 31, 1933, attached thereto) for notation of reduction by partial payment and for modification (as so reduced) as hereinafter provided.

To the end that the amount remaining due on presently outstanding bonds as so reduced and modified, shall be for multiples of Twenty-five ($25.00) Dollars principal, with interest thereon as hereinafter provided from July 10, 1933, scrip certificates shall be issued as provided in the indenture, bearing no interest, and exchangeable within two years for bonds as so reduced and modified, in multiples of Twenty-five ($25.00) Dollars.

5. The amount to be paid to all creditors (not entitled to priority) whose claims are not based upon presently outstanding bonds of Realty Associates Securities Corporation, shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed, or if not filed and allowed, then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein, and at the time of such payment such creditors shall also receive presently outstanding bonds now in the treasury of Realty Associates Securities Corporation issued under the indenture above mentioned dated October 1, 1928 (reduced and modified in the same manner as the presently outstanding bonds as provided in subdivision 4 hereof and as hereinafter provided) equal in such reduced face amount to 85% of the amount of their said claims on which said 15% payment in cash is computed.

6. The presently outstanding bonds above referred to, when presented for notation of reduction by partial payment and for modification as hereinabove provided, or when issued and delivered to other creditors as hereinabove provided, will be fully registered in the name of the owner, and all coupons shall be detached, and, by appropriate notation to be stamped on the bonds, or by appropriate notation to be attached to the bonds by way of allonge or otherwise, the said bonds will be modified so as to be in conformity with and subject to the terms of an indenture to be entered into between Realty Associates Securities Corporation and Manufacturers Trust Company, a New York Trust Company, dated July 10, 1933, an unexecuted copy of which will be filed at the time of presentation and consideration of this offer (the said bonds as so modified being sometimes hereinafter referred to as "Bonds"), the salient features of the Bonds as so modified, and the salient features of said indenture being summarized as follows:

(A) The due date of all Bonds shall be October 1, 1943.

(B) Interest on the Bonds will accrue at the rate of 5% per annum from July 10, 1933, and will be payable on the first day of January and the first day of July in each year, and shall be cumulative; provided, however, that if in any semi-annual earnings period, as defined in said Indenture, the earnings of the company, as defined in said Indenture, shall not be equivalent to interest at the rate of 5% per annum upon the outstanding Bonds, interest shall be payable only to the extent of such earnings, any deficiency to be made up out

of the earnings during the first succeeding earnings period or periods during which the earnings of the company exceed 5% per annum upon the outstanding Bonds, to the extent of such excess, any accumulated interest not theretofore paid to be paid at the time of the maturity of the Bonds. All such earnings for any semi-annual earnings period (ending two months prior to the semi-annual interest payment date) not required for the payment of current accrued interest and arrears of interest on the Bonds, shall be deposited in the Retirement Account, as provided in Subdivision (E) hereof.

(C) Earnings for each semi-annual earnings period will be arrived at as follows:

By totaling all cash receipts of:

(a) Interest;

(b) Dividends;

(c) Rents and other income from real property owned or leased;

(d) Profits realized on a sale of any asset;

(e) Amounts received on mortgages and installment contracts in excess of the book value of these securities or their cost, whichever is lower;

(f) Amounts received from the settlement of judgments, guarantees or other similar items, to the extent that such cash represents profit;

(g) Amounts collected as awards for property taken in condemnation proceedings, to the extent that such cash represents profit;

(h) All other cash receipts which sound, conservative accounting practice would consider income or profit; 37

and from this total shall be deducted the total of the following:

(a) Operating expenses of the company;

(b) Cash payments for maintenance, minor improvements and for carrying charges and protection of property owned or mortgaged, including taxes, assessments and interest on prior liens (other than interest payments on the Bonds); 38

(c) Losses in connection with the sale, exchange or other disposition, reduction or elimination, of assets; provided that no such losses taken or incurred shall be deductible in connection with the calculation of earnings, to the extent that such losses would reduce earnings in any earnings period to an annual rate less than 3% per annum on the face amount of the Bonds outstanding on the next succeeding semi-annual date;

(d) All other cash expenditures which sound, conservative accounting practice would consider charges against income or profit, other than losses or charges included within the foregoing subdivision (c). 39

The determination of profits or losses shall be made with reference to cost or book value, whichever is lower.

The expenses of administration in bankruptcy and the costs of the composition shall not be deducted in calculating the earnings of the company.

(D) The company will, semi-annually, file with the Trustee a certificate signed by an independent accountant, to be approved from time to time by the Trustee and a majority of the Bondholders' representatives hereinafter referred to, showing its Earnings for the Earnings Period immediately preceding each semi-annual interest date and the basis or method of ascertaining or computing the same. Such certificate shall be conclusive and binding upon the Company, upon the Trustee and upon the Bondholders with respect to the amount of interest payable on any semi-annual interest date and all other matters in which the determination of Earnings is involved.

(E) Retirement of Bonds out of earnings is to be provided for as follows:

At least four (4) days prior to each semi-annual interest date, all earnings for the preceding earnings period not applied or to be applied to the payment of current accrued interest and arrears of interest on the Bonds, shall be deposited with the Trustee and held in a special account referred to as the "Retirement Account". Out of moneys in the Retirement Account the Company may purchase outstanding Bonds, but if any moneys deposited in the Retirement Account shall not have been so used within one (1) year after their deposit such balance shall be applied to the redemption of outstanding Bonds.

The Company may purchase Bonds out of moneys in the Retirement Account in such channels as the Company may determine, except that

Modified Offer of Composition.

(1) Such purchases shall be at a fair price, not in any instance in excess of the bona fide asked prices quoted at the respective times of such purchases for an equal amount of such Bonds at over-the-counter markets in New York or in Chicago, 43

and

(2) In such purchase of Bonds preference shall be given to written offers of sale of such Bonds then in effect submitted by holders of Bonds, provided the price payable for any such Bonds so offered for sale by any holder shall not be in excess of the bona fide asked prices quoted at the respective times of such proposed purchases for an equal amount of such Bonds at over-the-counter markets in New York or in Chicago. 44

(F) The Company will not pay any dividends of any kind upon, or make any distribution upon, or purchase or redeem its stock of any class at any time outstanding as long as any of the Bonds remain outstanding and payment thereof, both for principal and interest, has not been fully provided for. 45

(G) The Company will not at any time employ any of its cash, marketable securities, or other assets, for the acquisition of additional assets or property, other than the Bonds, except as follows:

(1) Assets or property in connection with realization upon, collection, reorganization or rehabilitation of other assets owned by the Company (including purchase money

mortgages upon property sold by the Company as owner).

(2) First and second mortgages on real property; installment contracts originating from the sale of dwellings and/or building lots; building loans wholly or partly advanced upon or secured by first mortgages on real property; junior interest and/or junior participations or ownerships in bonds secured by first mortgages on real property; senior interests, ownerships, or participations, in second mortgages, or bonds secured by second mortgages; awards in condemnation proceedings; loans or notes secured by such awards and/or by assets of the character described in this subdivision (2); provided that all real estate affected by any of the foregoing be located in the State of New York; United States Treasury Notes and Certificates of Indebtedness; bonds of the United States of America; bonds or Corporate Stock or other obligations of the City of New York; bonds of the State of New York; certificates of deposit issued by any New York bank or trust company; and bank acceptances made by any New York bank or trust company. The acquisition of any assets or property specified in this subdivision (2) shall be subject to the proviso that cash and/or marketable securities shall not be employed for the acquisition of assets or property, other than of the character described in the preceding subdivision (1), if thereby the amount of cash and marketable securities (as hereinafter defined) owned by the Com-

pany would at such time be reduced below $1,000,000. 49

(3) Other "marketable securities", defined as all securities, other than real estate mortgages and participations therein, in which savings banks may at the time in question invest under the laws of the State of New York.

Whenever Bonds are purchased, the same method of purchase shall be followed as is required by Subdivision (E) above.

In acquiring additional assets or property from any of its affiliates, the Company shall not pay to such affiliate more than 50

(a) the cost thereof to such affiliate if such additional assets or property have been purchased by an affiliate,

or

(b) the face amount thereof if such additional assets or property have not been purchased by an affiliate, but are in the nature of purchase-money obligations.

51

(H) The Company will not prior to January 1, 1937 create any new funded debt. The Company may subsequent to January 1, 1937 create new funded debt provided it is free of default under the Indenture herein described, and any other indenture relating to funded debt of the Company, and provided that it shall at the time of creating such new funded debt own cash, marketable securities and other assets of the type described above, equal to 120% of the aggregate principal amount of the Bonds then outstanding and of such new funded

52 debt. The Company will not create any mortgage or pledge as security for funded debt (not including any mortgage or mortgages which may from time to time be placed upon any individual parcel or parcels of real estate owned by the Company), unless the instrument creating it provides that the Bonds shall share equally and proportionately in the lien of such mortgage or pledge; and no new funded debt shall by its terms be due before October 1, 1943.

(I) The Company will cause quarterly audits and balance sheets to be made and filed with the
53 Trustee by independent accountants, in such form that it may be determined therefrom whether the Company has complied with the provisions of said Indenture.

(J) So long as any of the Bonds are outstanding and unredeemed, the number of Directors shall not exceed twelve (12), and four (4) of such Directors shall be persons chosen and selected by the holders of such Bonds as hereinafter provided;

For the period ending December 31, 1936, said four representatives on the Board of Directors shall be persons (who shall be holders of Bonds)
54 selected as follows:

Each of the three bondholders' committees, of which William E. Kennedy, Jr., J. Lester Fierman and Frederick S. Robinson are respectively chairmen, shall name one person to be one of such representatives of the bondholders, and the three so chosen shall be three of such representatives of the bondholders on the Board of Directors.

The fourth person to represent bondholders on the Board of Directors for the period ending December 31, 1936, shall be such person as a majority of the eight directors not chosen as representatives

of bondholders shall select from a list of names of nine persons made up of three names submitted by each of the bondholders' committees above mentioned. 55

For the period subsequent to December 31, 1936, the four persons who shall represent the bondholders on the Board of Directors shall be chosen as follows:

For the purpose of choosing and selecting such four representatives on the Board of Directors the holders of such Bonds shall be entitled to attend (in person or by proxy) any stockholders' meeting for the election of directors of the Company, and every registered owner of such Bonds (other than officers, stockholders, affiliates or subsidiaries of the Company, as defined in said Indenture) shall be entitled to cast one vote in respect of each One Hundred Dollars ($100) face value of the Bonds so registered in his or her name, for each of four such representatives who shall, when so chosen and selected, be elected to the Board of Directors by the stockholders of the Company. The right of owners of such Bonds or their proxies to vote for the election of such four representatives shall be established by the book for the registration and transfer of such Bonds kept at the principal office of the Trustee under such indenture, dated as of July 10, 1933, above mentioned or by a list of such registered bondholders stating the amounts of Bonds registered in their respective names, such list being certified by such Trustee. 56 57

58 (K) The salaries to be paid to all officers, directors and employees shall be fair and reasonable as compared with salaries paid by similar corporations of the same magnitude in similar lines of business, and there shall be no profit-sharing by officers, directors or employees nor any payments to any of them, other than such salaries.

(L) All dealings or transactions between the Company and affiliated corporations shall be evidenced by written documents authorized by the officers or directors.

59 (M) The Bonds will be redeemable by the Company at any time on thirty days' notice, at par plus accrued interest.

(N) Events of default will be as follows:

(a) The failure for thirty days to deliver the required accountant's certificate relating to earnings or to pay the amount of interest which shall be payable in accordance with such certificate;

(b) Failure to pay principal whenever the same shall become due and payable;

60 (c) Failure to fulfill any other covenant of the Indenture, continuing for a period of sixty days after notice of such default received from the Trustee.

(d) The declaration by the Trustee under any instrument under which any new funded debt shall have been created, that the same is immediately due and payable.

The Trustee may act upon the happening of such events of default and the lapse of appropriate

time either in its own discretion or upon the demand of not less than 25% in principal amount of the holders of bonds. 61

In case of failure to pay principal of the bonds at maturity, any bondholder may bring suit, rights of action for any other defaults being vested in the Trustee.

(O) The indenture shall contain appropriate provisions properly assuring the continuance of four directors selected by the bondholders (or by the three above-named bondholders' committees) and also assuring the continuance of the present management during the life of the Bonds, and declaring that if either of such provisions is violated all the Bonds shall become due on the declaration to that effect by holders of 10% of face amount of the Bonds. 62

(P) Nothing shall constitute an event of default under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927, and October 1, 1928, unless the same shall be an event of default under the provisions of the indenture between the same parties dated July 10, 1933, and each of said three indentures shall be deemed to be modified so as to be in accordance with and in no way inconsistent with the terms of the said indenture dated July 10, 1933. 63

7. The indenture hereinbefore described may contain any such provisions not inconsistent with this offer as may be agreed to by the Company and approved by the Court.

64 8. Filed herewith is an agreement between Realty Associates, Inc., and Realty Associates Securities Corporation, whereby Realty Associates, Inc., the holder of approximately $2,000,000 par value of presently outstanding bonds, agrees to accept on account and as part payment of the 15% due it in cash pursuant to the terms of this offer an assignment of the bond and mortgage for $275,000, covering property of the Queens County Jockey Club, known as the Aqueduct Race Track, the same to be accepted by Realty Associates, Inc. at the amount which Realty Associates, Inc. re-
65 ceived therefor from Realty Associates Securities Corporation, together with interest on such amount to the date of the assignment thereof, the balance of said 15% to be paid in cash to Realty Associates, Inc.

9. Realty Associates Securities Corporation will procure the execution and delivery to itself of guaranty agreements whereby payment of principal and interest of all bonds and mortgages purchased by Realty Associates Securities Corporation between January 1, 1933 and July 10, 1933, from affiliates (excluding The Prudence Company, Inc.,)
66 which are not now in the hands of a receiver or in bankruptcy, shall be guaranteed by the affiliate from whom the same were purchased (such affiliate being herein sometimes referred to as the "Guarantor"), provided that

(1) all such guaranty agreements shall be in the form used by Bond and Mortgage Guarantee Corporation, except that the period of grace shall be reduced to nine months;

(2) such guaranty agreements shall provide that the Guarantor shall have the right in the performance of any such guaranty, to substitute other mortgages and/or contracts (similarly guaranteed) in good standing, at a price which shall be the cost price thereof to such Guarantor, except that if such mortgages and/or contracts were not purchased by an affiliate but are in the nature of purchase-money obligations, the price at which the same shall be computed in such substitution shall be the face amount due thereon; 67 68

(3) such guaranty agreements shall provide that the Guarantor shall have the right in the performance of any such guaranty, to tender any bonds of Realty Associates Securities Corporation, at a price which shall be the market price thereof at that time or the amount which such Guarantor or an affiliate paid therefor, plus accrued interest—whichever amount shall be higher.

10. This composition, including the modification of the presently outstanding bonds and the indentures as hereinabove provided and the detaching of the coupons from the bonds, shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them. 69

11. The stock of Realty Associates Securities Corporation is now pledged to the Reconstruction

Finance Corporation as collateral for its guaranty of a loan made to The Prudence Company, Inc. Realty Associates Securities Corporation will use every endeavor to obtain from the Reconstruction Finance Corporation an agreement not to sell such stock to any person or persons until the presently outstanding bonds have been paid, but the obtaining of such agreement or of any action by the Reconstruction Finance Corporation in connection therewith shall not in any wise be a condition of this offer or its confirmation or acceptance.

12. The Bankrupt agrees to execute and cause to be delivered all instruments and documents necessary or proper to carry out the foregoing plan and offer of composition.

13. The Bankrupt further agrees to obtain the proper execution and delivery of any and all other documents by other corporations necessary or proper pursuant to the foregoing plan and offer of composition.

14. The foregoing plan and offer of composition shall become effective and binding on confirmation by the Court.

Dated, New York, October 26, 1933.

REALTY ASSOCIATES SECURITIES CORPORATION,
By VINCENT ROWAN,
Treasurer.

[Seal]

Attest:

C. D. OSBURN,
Secretary.

Modified Offer of Composition.

State of New York,
County of Kings—ss.: 73

On this 8th day of November, 1933, before me personally came VINCENT ROWAN, to me known, who, being by me duly sworn, did depose and say that he resides in Jamaica, N. Y.; that he is Treasurer of REALTY ASSOCIATES SECURITIES CORPORATION, a domestic corporation, the corporation described in and which executed the foregoing Offer of Composition; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 74

WILLIAM F. BEHRENS,
Notary Public,
Richmond Co.
Certificate filed Kings Co.

75

Modified Offer of Composition.

76 The indenture dated July 10, 1933, executed by Realty Associates Securities Corporation and Manufacturers Trust Company, a duplicate original of which was filed in the office of the Clerk of the United States District Court for the Eastern District of New York on or about the 5th day of December, 1933, for the purpose of carrying out the said offer of composition dated October 26, 1933, is the indenture dated July 10, 1933, referred to in subdivisions marked "6" and "7" of the foregoing offer of composition as hereby modified; and the guaranty agreements filed in the office of said
77 Clerk on or about the 5th day of December, 1933, are the guaranty agreements referred to in subdivision marked "9" of the foregoing offer of composition as hereby modified.

IN WITNESS WHEREOF, REALTY ASSOCIATES SECURITIES CORPORATION has caused this instrument to be signed by one of its officers, and its corporate seal to be affixed hereto this 16th day of February, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,

78 By FRANK FOX,

[Seal] President.

Attest:

C. D. OSBURN,
Secretary.

Modified Offer of Composition.

State of New York,
County of Kings—ss.: 79

On this 16th day of February, 1934, before me personally came FRANK FOX, to me known, who, being by me duly sworn, did depose and say that he resides in Brooklyn, N. Y.; that he is President of REALTY ASSOCIATES SECURITIES CORPORATION, a domestic corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 80

WILLIAM F. BEHRENS,
Notary Public.
[Notarial Seal]

81

Note as to Offer of Composition, Dated October 26, 1933.

82

The offer of composition dated October 26, 1933, was identical with the offer as quoted in the foregoing instrument, except that subdivision marked 2 thereof read as follows:

2. The Company agrees to pay all expenses of administration and of the composition, together with such compensation and expenses of the three bondholders' committees of which William E. Kennedy, Jr., J. Lester Fierman and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel including counsel for the Manufacturers Trust
83 Company in such amounts as the Court may fix or approve.

Application by Receiver, Fred L. Gross, for Allowance (February 27, 1934).

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

84 of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

To the District Court of the United States for the Eastern District of New York:

The petition of Fred L. Gross, respectfully shows:

1. That by order of this Court, dated July 10th, 1933, Frank Fox and the petitioner Fred

Application by Receiver, Fred L. Gross, for Allowance.

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L. Gross, were duly appointed Receivers herein and thereupon duly qualified by filing the required bond.

2. That the Receivers took charge of the assets of the estate committed to their care and of the books and papers of the bankrupt which were kept in the custody of the Receivers at the office of the bankrupt at No. 162 Remsen Street, Brooklyn, N. Y.

3. That the order appointing the Receivers authorized them to continue the business of the bankrupt for a period of twenty days, with leave to apply to this Court for a further extension, if necessary. 86

4. That the general nature of the business of the bankrupt is that of acquiring and holding mortgages and installment sales contracts covering or affecting real property, and as such, the bankrupt had, at the time of the appointment of the receivers, more than $9,000,000. in face value of mortgages, and more than $2,500,000. in so-called equities in installment sales contracts, and, as would be quite natural, the bankrupt also had a considerable number of parcels of real property of a book value of almost $2,000,000., subject to mortgages of about a million and a quarter dollars, and also had on hand more than $970,000. cash deposited in banks, and in addition, had on hand securities such as municipal notes and bonds, railroad and other bonds of a par value of more than two and a half million dollars, and also had on hand some of its own bonds which it carried as "treasury bonds" of the par value of $296,800., all 87

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as more fully shown by the inventory of the Receivers filed herein on August 18th, 1933, which shows a total of $16,467,170.91.

5. That prior to the filing of the petition in bankruptcy, the bankrupt had issued so-called 6% gold bonds under three mortgage indentures and in each of which the Manufacturers Trust Company was named as the trustee for the bondholders, the first of which indentures is dated July 1, 1925, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due

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July 1, 1937, with interest at 6% per annum payable January 1 and July 1, the second of which indentures bears date December 1, 1927, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due on December 1, 1939, with interest at 6% per annum payable June 1 and December 1 of each year, and the third of which indentures bears date October 1, 1928, and provides for an aggregate amount of bonds to the extent of $5,000,000. to become due October 1, 1943, with interest at 6% per annum payable April 1 and October 1 of each year.

90

6. That under the aforesaid mortgage indentures the bankrupt could, among other things, hold certain characterized mortgages and installment contracts as assets, and at the time of the appointment of the receivers, the bankrupt had on hand several thousand accounts of such mortgages and installment contracts, and in most instances, the mortgagor or equity owner, or the contract vendee, made monthly payments somewhat similar to rent payments, and these funds were, with rare exception, collected by the bankrupt upon an

91

understanding that application of collections would be made to interest on prior mortgages, taxes and water charges, and any surplus would be applied on the bankrupt's mortgage or installment contract.

7. That the business of the bankrupt consequently involved much detail work and required the retention of a sufficient staff of employees to handle the collections and to keep the records, and for that reason the receivers, promptly after their appointment, presented a petition to this 92
Court in which the Receivers presented, among other things, a statement of the arrangements made for the purpose of availing themselves of certain employees of the bankrupt instead of employing other help not familiar with the daily transactions of the bankrupt, and on July 18th, 1933, an order was made by this Court approving the proposed payroll presented by the Receivers.

8. That the authority to continue the bankrupt's business given to the Receivers in the order appointing the Receivers, expired on July 30, 1933, and the aforesaid order of July 18, 1933, extended such time to continue the business to August 29, 93
1933; thereafter the Receivers presented a petition bearing date August 25, 1933, praying that they be authorized to further continue the business of the bankrupt for thirty days from August 29, 1933, and an order was made bearing date August 28, 1933, authorizing the Receivers to continue the business of the bankrupt for a further period of fifteen days from August 29, 1933.

9. That the bankrupt had in contemplation offer of a composition to its creditors and your peti-

94 tioner had been informed that it was the desire of the bankrupt to postpone action upon the election of a trustee in the expectation that such offer of composition would be promptly acted upon, and during the time that the assets were in the custody of the Receivers, and that accordingly on or about August 31, 1933, notice was given by the referee of a meeting of creditors to be held on September 11, 1933, for the purpose of proving debts, examination of the bankrupt and to consider and act upon the proposed offer of composition.

95 10. That the examination of the bankrupt developed into protracted hearings and eventually resulted in a withdrawal of the offer of composition and in the making of a new offer of composition as hereinafter stated.

11. That meanwhile and at the meeting of creditors held on September 11, 1933, the creditors voted that the Receivers continue the business for forty days and thereupon an order was made on September 12, 1933, by this Court, authorizing the Receivers to continue the business of the bank-
96 rupt for a further period of twenty days from September 13, 1933.

12. That while the hearings were in progress with regard to the original composition offered by the bankrupt and in connection with a general examination of the bankrupt, and on September 28, 1933, the Receivers presented another petition upon which an order was made September 29, 1933, authorizing the Receivers to continue the business of the bankrupt for a further period of thirty days from October 3, 1933.

Application by Receiver, Fred L. Gross, for Allowance.

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13. That among other various proceedings in which the Receivers participated, was an application made by one of the creditors on or about September 20, 1933, for an order requiring the Receivers to employ accountants to conduct an audit of the books and records of the bankrupt which resulted in an order bearing date October 2, 1933, directing the Receivers to employ a named firm of accountants to make a limited examination and to advise the Court with regard to any further audit, all as will appear from the records of this Court reference to which is hereby made.

98

14. That on or about October 28, 1933, the Referee gave notice that the bankrupt would not make the offer of composition proposed in its petition dated August 31, 1933, but desired to offer terms of composition in substantially the form annexed to a petition dated October 26, 1933, and that a meeting of creditors would be held pursuant to Section 12a of the Bankruptcy Act on November 8, 1933, "for the purpose of proving debt, examination of the bankrupt, preservation and conduct of the estate and to receive and consider the proposed offer of composition and all matters pertaining thereto," and to consider fees and expenses of administration and of the composition, etc.

99

15. That thereupon and by petition dated October 30, 1933, the Receivers applied for an order authorizing them to continue the business of the bankrupt for a further period to extend to at least December 15, 1933, and on October 31, 1933, an order was made by this Court authorizing the Receivers to continue the business for a further

100 period to expire on December 15, 1933, unless before that time it was otherwise ordered by the Court.

16. That the Receivers have not employed any attorney or counsel and that prior to the filing of the petition in bankruptcy, the bankrupt maintained a Department designated as its Law Department in which it employed attorneys to conduct its foreclosure actions, dispossess proceedings and other proceedings and actions, and had
101 also employed other attorneys, outside of its regular Law Department, to perform similar services; that your petitioner had been informed that such attorneys rendered services for the bankrupt and for other corporations known as affiliate corporations; that on July 18, 1933, the Receivers presented a petition to this Court, hereinbefore referred to, to which petition was annexed a proposed payroll which included some of the attorneys in the aforesaid Law Department, and by order of this Court dated on that day, the proposed payroll was approved and the Receivers were authorized to employ one of the attorneys
102 named in such payroll in all pending actions and proceedings except rent and summary proceedings, and in the latter proceedings they were authorized to employ another of the attorneys named in such payroll, all upon condition that neither of such attorneys would receive any compensation other than the salary mentioned in the payroll annexed to said petition, and that as to all other pending actions and proceedings, in which the bankrupt then appeared by attorneys other than those named in the payroll schedule, the Receivers were au-

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thorized to continue the services of such attorneys in any case or proceeding deemed essential.

17. That no attorney, not named in the aforesaid payroll, rendered any services for the Receivers directly in this bankruptcy proceeding except that Alfred T. Davison, Esq., attorney for the bankrupt, instituted, and, in co-operation with the Receivers, conducted a proceeding before the referee for the determination of a disputed question with regard to a claim of the Manufacturers Trust Company to offset the face value of certain bonds of the bankrupt owned by said trust company, against the bank balance to the credit of the bankrupt; that in the few instances where outside attorneys had charge of any matters for the bankrupt, the same were only pending foreclosure actions, some of which were completed during the receivers' administration of the estate and in which no attorney received any compensation in excess of the costs and allowances as provided by the statutes of the State of New York applicable to foreclosure cases.

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18. That in some aspects the business of the bankrupt corporation is very much like that of some of the larger mortgage corporations carrying on business in the City of New York, but in other respects the business is wider in scope than the business of a general mortgage corporation in that the business of the bankrupt corporation included owning of many parcels of real property sold by affiliates on a plan involving instalment payments on the part of the purchaser. As above stated, the bankrupt corporation had, among its assets, a considerable number of parcels

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106 of real property referred to in the inventory filed by the receivers, and this bankruptcy proceeding involved assets of a nature quite different from, and of a value much larger than, bankruptcy proceedings which ordinarily would come into the bankruptcy courts of this district; that the payroll schedule attached to the aforesaid petition upon which the order of July 18, 1933 was made, lists eight employees in the Bookkeeping Department, two in the Executive and Sales Departments, six in the so-called Tax Department, eleven
107 in the Collection Department, nine in the Law Department, including stenographers and law clerk, three in the so-called Maintenance Department, and also a telephone operator, making a total number of forty employees.

19. That thereafter the composition proposed by the bankrupt was accepted by the requisite number and amount of creditors, and an order was made on November 24th, 1933, directing the receivers to deliver to the Manufacturers Trust Company, as agent to carry out the terms of the composition certain bonds and monies as in said
108 order provided, and by order of November 29th, 1933, the Manufacturers Trust Company, 32 Court Street Branch, Brooklyn, was again designated as the agent, under the direction of the Clerk of this Court, to carry out the terms of the composition offered to the creditors and the receivers were directed to deposit with the Clerk of this Court the sum of $1,850,000. in cash out of the monies and funds of the bankrupt estate in the hands of the receivers and also a certain bond and mortgage for $275,000 covering property known as the Acqueduct Race Track.

Application by Receiver, Fred L. Gross, for Allowance.

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20. That thereafter an order was made bearing date December 2, 1933, reciting that such order and the directions therein are necessary in order to carry out the terms of the composition, and such order directed the receivers to sell in the open market $483,000. face amount City of New York special corporate stock notes and to deposit $405,000. from the proceeds of such sale, with the Clerk of this Court, to be used for the purpose of carrying out the terms of said composition in the event that the same be confirmed.

110

21. That thereafter the referee made his report upon such composition and reported that the total amount to be paid to creditors upon the composition is $12,800,206.40 and notice was given that the hearing on the application for an order to confirm such composition would be held December 18, 1933.

22. That meanwhile and on December 15, 1933, another order was made authorizing and empowering the receivers to continue the business of the bankrupt for a further period to expire on January 4, 1934, and after hearings upon said offer of

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composition, and about December 30, 1933, this Court rendered an opinion declining to confirm the composition because of certain provisions with regard to compensation and expenses of bondholders' committees and their attorneys including counsel for the Manufacturers Trust Company, and directing that the matter be returned to the referee with instructions to ascertain and report whether a majority in number and amount of creditors would accept the composition with the agreement as to compensation aforesaid eliminated.

Application by Receiver, Fred L. Gross, for Allowance.

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23. That an appeal was thereupon taken from the order entered upon such decision.

24. That meanwhile and on January 2, 1934, an order was made authorizing and empowering the receivers to continue the business of the bankrupt for a further period to expire February 5, 1934.

25. That on January 4, 1934, my co-receiver Frank Fox resigned and on February 3, 1934, a further order was made authorizing and empower-
113 ing me to continue the business of the bankrupt for a further period to expire March 5, 1934.

26. That since the resignation of my co-receiver, I have acted as sole receiver.

27. That on February 2, 1934, an order was made authorizing and empowering me as receiver to sell, without notice to the creditors, at current market prices, certain securities consisting of certain New York City corporate stock notes and Atlantic Coast Line bonds, and the same
114 were sold for a total selling price of $675,617.30 which, according to statement prepared by the head bookkeeper netted a profit of more than $62,000.

28. That in addition to the bank balances of $973.193.91 which came into the hands of the receivers at the time of their appointment, there has been taken in by way of cash receipts up to February 15, 1933, a total of $2,570,712.39 according to figures prepared by the head bookkeeper, which amount includes receipts from

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securities which were paid off and sales made pursuant to the orders of the Court, and there has been paid out up to February 15, 1933, by way of cash disbursements and deposits with the Clerk and with Manufacturers Trust Company, pursuant to orders of the Court, approximately $2,655,756.53 so that the total balance of cash on hand as of February 15, 1934, amounted to $888,149.77.

29. That the nature of the business of the bankrupt required the constant attention of your petitioner as Receiver and in addition thereto, your petitioner prepared many of the papers required in various applications, and in other instances caused such papers to be prepared by the attorneys in the Law Department, and your petitioner supervised the preparation of many of such papers. 116

30. That a more detailed statement of the services rendered by your petitioner is set forth in the annexed schedule.

31. That for the purpose of computing the compensation of the receivers herein your petitioner is adopting the amount which the referee reported as the total amount to be paid to creditors upon the composition in the report heretofore made by the referee, to wit: $12,800,206.40. 117

32. That upon the basis of the foregoing amount as the amount to be paid creditors on the composition herein, your petitioner claims for the services of the Receivers, compensation by way

118 of commissions to the extent of $64,001.03 estimated as one-half of one per centum of the amount to be paid creditors on the aforesaid composition, and for conducting the business of the bankrupt your petitioner claims compensation for the Receivers by way of commissions to the extent of $64,001.03 estimated as one-half of one per centum of the amount to be paid creditors on the aforesaid composition, making $128,002.06, as the total sum claimed by your petitioner as the compensation of the receivers, and if the Court shall
119 determine that each receiver is entitled to full separate compensation, then your petitioner claims compensation in the total sum of $128,002.06, but if the Court shall determine that the total compensation of the receivers shall be apportioned, as between the two Receivers, and that each of the Receivers is not entitled to full separate compensation, then, in view of the services rendered by your petitioner and in view of your petitioner having acted as sole receiver since January 4, 1934, your petitioner claims the sum of Ninety-five thousand ($95,000) Dollars as and for his
120 own and separate compensation and allowance as Receiver herein.

33. That your petitioner has received no compensation for his services as receiver and in conducting the business of the bankrupt under the aforesaid orders of this Court, nor has any partial allowance heretofore been made to your petitioner.

34. That your petitioner will necessarily render further services as receiver and in conducting the

Application by Receiver, Fred L. Gross, for Allowance.

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business of the bankrupt, subsequent to the date of this petition.

WHEREFORE your petitioner prays for the allowance of such compensation as hereinbefore claimed.

Dated: February 27, 1934.

FRED L. GROSS,
Petitioner.

(Verified Feb. 27, 1934.)

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State and City of New York,
County of Kings—ss.:

FRED L. GROSS being duly sworn, says: I am the applicant in the foregoing petition and now the sole receiver of the above named bankrupt. No agreement has been made, directly or indirectly, and no understanding exists, for a division of fees between myself and my former co-receiver, the trustee, the bankrupt, the debtor, or any of them, or the attorney of any of them.

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FRED L. GROSS.

Subscribed and sworn to before me this
27th day of February, 1934.

EDWIN F. BLANEY,
Notary Public, etc.

Detailed schedule of services rendered by Fred L. Gross, as Receiver, has not been printed for this record.

Receiver's Affidavit Under Rule 11 of the District Court.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

125 State and City of New York,
County of Kings—ss.:

FRED L. GROSS being duly sworn, says: I am now the sole receiver of the above named bankrupt. I have not been paid or promised, and have no knowledge or information that any attorney has been paid or promised, any money or other property by the bankrupt, except that I am informed by a printed copy of the offer of composition made herein, that "the Company (the bankrupt) agrees to pay all expenses of administration and of the
126 composition."

I am also informed by Orrin G. Judd, Esq., associate in this proceeding, of Alfred T. Davison, Esq., attorney for the bankrupt, that the bankrupt has paid, or promised to pay, the following amounts to attorneys:

To Alfred T. Davison, Esq., attorney for the bankrupt, Sixteen thousand five hundred ($16,500.) Dollars, out of which amount Four thousand ($4,000.) Dollars is to be paid to Van Vorst, Siegel & Smith, Esqs., for

services in connection with preparation of new indenture, etc.; 127

To Robert P. Levis, Esq., for services rendered in connection with this bankruptcy proceeding, Five thousand ($5,000.) Dollars.

I am likewise further informed that in addition, the bankrupt has paid, or promised to pay, since March 10th, 1933, but for matters not connected with the bankruptcy proceedings, the following amounts to attorneys:

To Beekman, Bogue & Clark, Esqs., Two hundred fifty ($250.) Dollars, plus $33.55 disbursements; 128

To Newman & Bisco, Esqs., Five thousand ($5,000.) Dollars, plus $20. disbursements;

To Chadbourne, Stanchfield & Levy, Esqs., Five thousand ($5,000.) Dollars plus $130.17 disbursements;

To VanVorst, Siegel & Smith, Esqs., Five thousand ($5,000.) Dollars, plus $235.69 disbursements.

The receivers have not employed any attorney or counsel. Prior to the filing of the petition in bankruptcy, the bankrupt maintained a department designated as its Law Department in which it employed attorneys to conduct its foreclosure actions, dispossess proceedings and other proceedings and actions, and had also employed other attorneys, outside of its regular Law Department, to perform similar services. I was informed that such attorneys rendered services for the bankrupt and for other corporations known as affiliate corporations. On July 18th, 1933, the receivers presented a petition to this Court to which was 129

130 annexed a proposed payroll which included some of the attorneys in the aforesaid Law Department and by order of this Court dated on that day, the proposed payroll was approved and the receivers were authorized to employ one of the attorneys named in the payroll in all pending actions and proceedings except rent and summary proceedings and in the latter proceedings they were authorized to employ another of the attorneys named in such payroll, all upon condition that neither of such attorneys would receive any compensation other than the salary mentioned in the payroll annexed to the petition, and that as to all other
131 pending actions and proceedings, in which the bankrupt then appeared by attorneys, other than those named in the payroll schedule, the receivers were authorized to continue the services of such attorneys in any case or proceeding deemed essential.

No attorney, not named in the aforesaid payroll, rendered any services for me as receiver directly in this bankruptcy proceeding except that Alfred T. Davison, Esq., attorney for the bankrupt, instituted, and, in co-operation with the receivers, conducted, a proceeding before the Referee for
132 the determination of a disputed question with regard to a claim of the Manufacturer's Trust Company to offset the face value of certain bonds of the bankrupt owned by said Trust Company, against the bank balance to the credit of the bankrupt. In the few instances where outside attorneys had charge of any matters for the bankrupt, the same were only pending foreclosure actions, some of which were completed during the receivers' administration of the estate and in which no attorney received any compensation in excess of the costs and allowances as provided by the Statutes

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of the State of New York, applicable to foreclosure cases.

FRED L. GROSS.

Sworn to before me this
8th day of March, 1934.

EDWIN F. BLANEY,
Notary Public,
Kings County, N. Y.

(Seal)

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Report on Composition of Referee Eugene F. O'Connor, Jr., Dated March 12th, 1934.

The material portions of this report are as follows:

5 and 6. Fred L. Gross and Frank Fox.

The petition of the bankrupt sets forth total liabilities in the sum of $12,651,260.56, and assets in the sum of $16,733,158.34.

The business of the bankrupt was that of acquiring and holding for investment, first and second mortgages and purchase money mortgages and installment sales contracts covering real property in the Metropolitan area. 135

The bankrupt owned over two thousand such items, of an aggregate value of more than $9,000,000.00, in addition to re-acquired real estate of a book value of approximately $900,000.00, and also held more than $3,000,000.00 in cash and marketable securities.

I shall not attempt to set forth in detail the services rendered by the receivers herein.

136 It appears that Mr. Gross, as one of the receivers herein, acted as such from the date of his appointment and will continue so to act until the confirmation of the composition and dismissal of the petition herein.

Mr. Fox acted as receiver herein from the date of his appointment to and including January 4, 1934, when he resigned as such receiver.

It appears that the total amount of moneys disbursed or turned over to lien holders by the said receivers was $2,534,145.00.

137 In passing upon the application of the receivers and in fixing the amount of their compensation, I have been influenced by the admirable decision of Judge John Woolsey, one of the Judges of the United States District Court for the Southern District of New York, in the *Matter of N. Osofsky & Sons*, 50 Fed. (2d) 925, 18 Am. B. R. (N. S.) 93, page 96, which reads as follows:

> "The elements to be considered in determining an attorney's fee were once most aptly summarized in evidence given on a reference by Honorable William G. Choate, formerly a judge of this court, and David
138 B. Ogden, Esq., a well known lawyer of a generation ago.
>
> They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand but are to be fixed:
>
> 1. The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary.

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2. The quality of skill which the situation facing the attorney demanded.

3. The skill employed in meeting that situation.

4. The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer.

5. The result of the case, because that determines the real benefit to the client.

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6. The eminence of the lawyer at the bar, or in the specialty in which he may be practicing."

While this opinion refers to attorneys' fees, the considerations enumerated therein may well be applied in passing on the compensation of the receivers herein, limited only by the restrictions of the statute.

In this regard, Fred L. Gross, Esq., receiver herein, is an attorney of some thirty-four years' standing. He is of counsel for one of the largest Title Companies of this City and has and is rep- 141
resenting as attorney many large realty interests throughout the City. I need not call the Court's attention to the fact that he is President of the Brooklyn Bar Association.

In addition to the services enumerated in the petition, Mr. Gross has acted as counsel for the receivers in very many matters arising out of the administration of this estate, thus saving the estate the expense incident to the employment of an attorney for the receivers.

142 Frank Fox, one of the receivers, is President of the bankrupt corporation, President of the Realty Associates, Inc., and an officer and director of many of the affiliates of the bankrupt. Unquestionably, Mr. Fox's services have been of extreme value to the administration of this estate.

An indication of the efficiency of the receivers' conduct of the business is shown by the fact that during the period from July 10, 1933 to October 1, 1933, the only period for which figures are at present available, the cash earnings of the bankrupt were at the rate of 4% per annum.

143 In arriving at the compensation of the receiver under the terms of the composition which contemplates ultimate payment in full to creditors, they are entitled to have same considered on the basis of the amount to be paid to creditors, although part of the consideration is obligations filed with the Court to be afterwards turned into money, since it has been recognized by the authorities that the said amount includes the amount which creditors are to receive by virtue of the composition agreement. See Collier on Bankruptcy, Vol. I, 13th Ed. 1923, page 982, also Vol.

144 2, page 1079. In *H. Batterman Co.* (C. C. A. 2), 231 Fed. 699, 700, *Kinkead v. J. Bacon & Sons* (C. C. A. 6), 230 Fed. 392, 36 Am. B. R. at pages 395 and 396 the Court says:

> "The amount offered by the bankrupt and accepted by the creditors became, upon confirmation, 'the amount to be paid creditors'. This construction not only seems logically to result from the consideration to which we have already referred, but receives additional confirmation when con-

145 sideration is given to the difference between the language 'on all moneys disbursed to creditors by the trustee' (on which the one per cent. commission is to be computed in the case of a fully administered estate) and the 'amount to be paid to creditors', on which one-half of one per cent. is to be paid in case of composition—not requiring complete administration. * * * Again, the suggestion that the amount to be paid to creditors means only the amount actually paid out by the court 146 loses its force when it is considered that an actual disbursement or supervision of disbursement by the referee personally is not required as a condition for the allowance of either commissions given by section 12b. His commissions would be the same were that disbursing supervision performed by the district judge, as it might be. See General Order in Bankruptcy No. 29. The statute merely makes a universal, and thus somewhat arbitrary, rule for payment of compensation."

147 "We are therefore of opinion that the referee was entitled to a commission of one-half of one per cent. on the amount 'to be paid by the bankrupt to creditors', regardless of the fact that payment was not made directly by the bankruptcy court; and that this 'amount to be paid includes the sums to which the noteholders were entitled by virtue of the composition proceedings, to bring about which they have employed the machinery of the Act and the processes of the court'."

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In view of the foregoing, and having in mind the magnitude of the amount involved herein and the nature and character of the services rendered by the receivers, I recommend an allowance on account of commissions to Fred L. Gross, Esq., receiver, one-half of one per cent. of the total sum of $13,008,038.30, or the sum of $65,040.19.

I recommend to Frank Fox, receiver, on account of commissions, the sum of $43,360.13.

Dated, Brooklyn, N. Y., March 12, 1934.

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Respectfully submitted,

EUGENE F. O'CONNOR, JR.,
Referee in Bankruptcy.

Application for Confirmation of Modified Composition.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

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of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The petition of Realty Associates Securities Corporation, Bankrupt, respectfully shows to the Court and alleges:

1. Your petitioner respectfully refers, to the

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same extent as if here set forth in full, to its petition, dated, signed and verified by James Graham, one of its Vice Presidents, on December 5th, 1933, and filed in the office of the Clerk of this Court on December 5th, 1933, wherein your petitioner made application for confirmation of offer of composition dated October 26, 1933, and your petitioner repeats and realleges the allegations therein contained. A copy of said petition is annexed to the original of this application for the convenience of the Court.

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2. Thereafter such proceedings were had that said application for confirmation of said offer of composition dated October 26th, 1933 came on to be heard before this Court on the 21st day of December, 1933, and thereafter on the 30th day of December, 1933, the District Judge before whom said application came on to be heard, rendered his decision wherein, after stating that from a financial standpoint it seemed to said Judge that the offer is in the best interests of the creditors, said District Judge decided that the Court could not confirm said composition with the following agreement forming a part thereof, viz.: the agree- 153
ment of the bankrupt to pay

> "* * * such compensation and expenses to the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the Court might fix or approve"

154 and said District Judge thereupon directed that the matter be returned to the Referee with instructions to ascertain and report in the usual manner whether a majority in number and amount of the creditors whose claims have been allowed will accept the composition with the agreement of the bankrupt last hereinabove stated eliminated from such agreement and with modifications of other terms of the agreement, if any, which the bankrupt may propose.

155 Thereafter, on January 5, 1934, an order was made and entered herein in accordance with said decision of the District Judge denying the application for the confirmation of the composition dated October 26, 1933 offered by the bankrupt, upon the ground set forth in the above mentioned opinion of the Court made and filed herein on December 30, 1933, and containing the following additional provision:

> "ORDERED that this matter be returned to the Hon. Eugene F. O'Connor, Jr., Referee, with instructions to ascertain and report
> 156 in the usual manner, whether a majority in number and amount of the creditors, whose claims have been allowed, will accept the composition with the agreement of the bankrupt to pay
>
> 'such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers

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Trust Company, in such amounts as the court may fix or approve,'

eliminated from such offer of composition and with modification of other terms of the agreement, if any, which the bankrupt may propose, and that on the filing of such report of the referee, application for the confirmation of the modified offer of composition may be brought on in the usual manner before the Court."

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3. Said order dated January 5, 1934, was affirmed by decision of the United States Circuit Court of Appeals dated February 13, 1934, and the mandate thereon was filed in the office of the Clerk of this Court on February 28, 1934, and an order was made and entered by this Court on said mandate on March 13th, 1934.

4. Thereafter your petitioner, by instrument dated February 16, 1934, modified its proposed composition dated October 26, 1933, pursuant to the opinion of the United States District Court for the Eastern District of New York, dated December 30, 1933, the order of said Court dated January 5, 1934, and the opinion of the United States Circuit Court of Appeals dated February 13, 1934, by eliminating therefrom the agreement of the bankrupt to pay

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"such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including

160 counsel for the Manufacturers Trust Company, in such amounts as the Court may fix or approve."

Annexed hereto and marked "Schedule A" and made a part hereof as though herein set forth at length, is a copy of the terms of composition offered by your petitioner as so modified, from which it appears that said offer of composition, as so modified, is the same as the offer of composition dated October 26, 1933, except that the above
161 mentioned agreement by the bankrupt has been eliminated therefrom.

5. Thereafter, pursuant to petition filed with the Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy on February 16, 1934, a meeting of creditors of your petitioner was duly called and held before said Referee to vote upon the offer of composition as so modified, and a majority in number and amount of creditors whose claims have been allowed accepted in writing the composition, with the agreement of the bankrupt quoted in subdivision marked 2 hereof, eliminated there-
162 from, and their written acceptances of the offer of composition as so modified have been duly filed with said Referee.

6. Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy, has filed his certificate in conformity with Bankruptcy Rule 13 of this Court.

7. The consideration to be paid by the bankrupt to its creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings having been deposited in such place as designated by and subject to the order of the Judge, by depositing (1) with the Clerk of this Court: (a) the sum of $2,255,000 in cash;

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(b) the bond and mortgage for $275,000, covering property of Queens County Jockey Club, known as the Aqueduct Race Track, and referred to in subdivision marked 8 of the composition offer; (c) an assignment of such bond and mortgage from Realty Associates Securities Corporation to Realty Associates, Inc.; (d) an original counterpart of the indenture dated as of July 10, 1933, between Realty Associates Securities Corporation and Manufacturers Trust Company; (e) an affidavit by the Secretary of Realty Associates Securities Corporation to the effect that 164
the guaranty agreements required by subdivision marked 9 of the composition above referred to have been executed and delivered and are in the possession of said Realty Associates Securities Corporation; (f) certified copies of resolutions by the affiliates which executed the aforesaid guaranty agreements ratifying and confirming them and directing that they shall be fully effective as compliance with the said offer of composition dated October 26, 1933, as modified by said instrument dated February 16, 1934; and (2) with said Manufacturers Trust Company, as agent, pursuant to the orders entered November 24 and 29, 1933, 165
and referred to in the above mentioned petition of the bankrupt, verified December 5, 1933, to carry out the terms of the composition offer, the treasury bonds and scrip certificates necessary to carry out the said composition offer.

8. Your petitioner has filed objections to the following claims, which objections have not yet been heard and determined:

(1) Claim of Almon G. Rasquin, as Collector of Internal Revenue for the principal amount of $124,568.01;

166 (2) That part of claim of The Prudence Company, Inc. dated January 10, 1934, which is for the principal amount of $207,583.95, as more particularly set forth in the objections filed by your petitioner, dated February 27, 1934.

and the said sum of $2,255,000 in cash heretofore deposited with the Clerk of this Court as hereinabove set forth is sufficient to pay the cash amount payable on said claim of Almon G. Rasquin, as Collector of Internal Revenue, if allowed,
167 and the 15% cash payment on said claim of The Prudence Company, Inc. if allowed, in addition to all other payments of cash required by said offer of composition.

Your petitioner reserves the right, within ten (10) days after the confirmation of this composition, to object to any other claims which may have been filed herein.

9. Your petitioner objects to the computation of the commissions of the Referee on the amount of $13,008,038 as the amount to be paid to creditors on this composition, and also to any allow-
168 ance to and any claim by any Receiver herein for compensation by way of commission over and above the fair and reasonable value of the services of said Receiver. Your petitioner also objects to the inclusion of the face amount of the bonds (as so reduced and modified) retained by or delivered to creditors on this composition as the basis of the computation of commissions to the Referee or compensation by way of commissions to any Receiver, and also to the inclusion of any present value, market or otherwise, of said bonds last mentioned, in such computation. Your peti-

tioner respectfully asks that it be permitted, if so advised, to offer proof on the hearing of this application for confirmation of said modified offer of composition of the actual market value of the bonds of your petitioner which are retained by creditors now holding outstanding bonds of your petitioner, when reduced and modified as set forth in said offer of composition, and of the value of such outstanding bonds of your petitioner as so reduced and modified, as are to be delivered to creditors who are not holders of presently outstanding bonds of your petitioner, without, however, conceding that any value of said bonds is relevant to the determination of the commissions of the Referee or the compensation of the Receivers, or should enter in any way into said computation, and reserving the claim which your petitioner has at all times made that the only amount on which commission of the Referee may be computed is the amount of cash to be paid to creditors on said composition (including the Aqueduct Race Track mortgage as if part of the cash), namely $2,091, and that the maximum compensation of the Receivers is measured by the stautory percentages upon the moneys disbursed or turned over by them to any person, including lienholders, or the statutory percentage upon the amount to be *paid* to creditors on said composition, whichever amount shall be the smaller.

10. Annexed hereto and marked "Schedule B" is a copy of a letter which your petitioner forwarded by mail on February 24, 1934 to all of its creditors, and annexed hereto and marked "Schedule C" is a copy of the postal card enclosed therein. Thus far 1,650 creditors have

172 returned said postal cards or otherwise replied to said letter, with the following result:

1,616 creditors, owning claims of an aggregate amount of $4,800,800 have stated they are in favor of the acceptance of said offer of composition as modified.

34 creditors, owning claims of an aggregate amount of $73,500 have stated they are opposed to the acceptance of said offer of composition as modified.

173 Such replies are constantly being received by your petitioner and will, as your petitioner believes, be received subsequent to the filing of this petition. Your petitioner respectfully begs leave to submit to the Court on the hearing of this application for confirmation of said modified offer of composition, all the postal cards and replies which your petitioner has received to said letter, a copy of which is hereto annexed and marked "Schedule B".

11. In connection with the mailing of notices to creditors of the hearing upon this application, 174 your petitioner respectfully refers to the petition of the bankrupt verified December 7, 1933, and, upon information and belief, repeats and realleges with reference to the offer of composition as modified as aforesaid, the allegations contained in said petition verified December 7, 1933. For the convenience of the court, a copy of said petition is annexed to the original of this petition.

WHEREFORE, your petitioner respectfully prays:

(1) that the said offer of composition dated October 26, 1933 as modified, a copy

of which is hereto annexed and marked "Schedule A" be confirmed; 175

(2) that this Court fix a date and place for a hearing upon this application and prescribe the manner of giving notice thereof;

(3) that your petitioner be given leave to offer such proof as it may be advised is necessary in the premises with respect to, or as an aid to the Court in determining, the amounts to be paid as commissions of the Referee and compensation of the Receivers; 176

(4) that Manufacturers Trust Company be appointed distributing agent to carry out the terms of said offer of composition;

(5) that any payment to any creditors or other persons whose claim may be objected to by your petitioner shall be withheld until the determination of said objections and the fixation and approval of the amount of such claims by this Court or by the Special Master to be appointed by the Court and until such report of said Special Master has been duly confirmed by this Court and that all such objections not heretofore filed shall be filed within ten days after the date of the order confirming the composition; 177

(6) that all real estate, mortgages, installment contracts, securities, money, personal property, choses in action and other property of your petitioner, over and above such money and securities as may be neces-

178 sary to pay the creditors the amounts set forth in the offer to be paid them; and the expenses of administration and of the composition, together with such sums as may finally be determined, approved and fixed by the court as commissions of the Referee, compensation of the Receivers, and the claim of Almon G. Rasquin, as Collector of Internal Revenue, and the claim of the said The Prudence Company, Inc., be returned to and vest in your petitioner upon the confirmation of said com-
179 position;

(7) that the Receivers be directed to file an account in accordance with Rule 13 of the Rules of this Court and that the Court retain jurisdiction of the matter until the final determination of such accounting by the Receivers;

(8) that the Court reserve power from time to time, without further notice to creditors, to make such other and further orders respecting the distribution of the
180 consideration of the composition, objections to claims and allowances, and the carrying out of the said offer of composition, as may be necessary or appropriate;

(9) and for such other and further relief as may be just and proper.

Dated, Brooklyn, N. Y., March 13, 1934.

REALTY ASSOCIATES SECURITIES CORPORATION,

By JAMES GRAHAM,
Vice-President,
Petitioner.

Application for Confirmation of Modified Composition.

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State of New York,
County of Kings—ss.:

JAMES GRAHAM, being duly sworn, deposes and says: that he is a Vice-President of Realty Associates Securities Corporation, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

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JAMES GRAHAM.

Sworn to before me this
13th day of March, 1934.

SCHEDULE A, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

This is identical with the instrument, dated February 16, 1934, modifying the offer of Composition dated October 26, 1933, which instrument is printed on pages 8-27 of the Record. 183

SCHEDULE B, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

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REALTY ASSOCIATES SECURITIES CORPORATION
162 Remsen Street
Brooklyn, N. Y.

February 23, 1934.

To Our Bondholders:

A notice has been sent to you by Hon. Eugene F. O'Connor, Jr. of a meeting on February 28th
185 to consider the modified offer of composition made by this company. The only change in this offer from that previously approved by a large majority of the bondholders, is the elimination of the agreement by this company to pay any fees or expenses of bondholders' committees or their counsel or counsel for Manufacturers Trust Co.

There has been deposited with the court $1,850,000 in cash, to cover the distribution of 15% of the face value of each bond, and if this modified offer is approved, you should receive your 15% in cash and 85% in adjusted bonds within thirty days. We believe the value of your bonds will be
186 greatly improved by the early acceptance of this offer of composition.

Since the original offer of composition was presented, certain indictments or charges have been brought in the United States District Court against the executive officers of the company, who, under the proposed offer of composition are to continue to manage the company. They are convinced that such indictments are entirely unwarranted. Nevertheless, they wish frankly and

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openly to ask the bondholders whether the fact of such indictments makes any change in the attitude of the bondholders heretofore expressed.

Consequently, we ask you to sign and return the enclosed postal card in order that your present attitude may be duly recorded.

We do not hesitate to recommend your voting in favor of the offer of composition and we are convinced that united action of our bondholders will lead to the end of all delays and result in bringing this matter to a speedy and successful conclusion.

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Yours very truly,

FRANK FOX
President.

Please do not fail to mark the enclosed postal card with a cross in one of the boxes, state the amount of bonds you own, sign your name, and mail the card promptly.

Note: All expense of this letter and enclosure is being paid by Realty Associates, Inc. and not by the bankrupt.

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SCHEDULE C, ANNEXED TO PETITION OF REALTY ASSOCIATES SECURITIES CORPORATION.

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February , 1934.

To Whom It May Concern:

I wish to have my vote recorded as follows on the modified offer of composition of Realty Associates Securities Corporation referred to in notice from the Referee dated February 17, 1934:

In favor ☐
Against ☐

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(Signature).....

Amount of bonds owned $.....

First Class
Permit No. 26
(Sec. 510, P L & R)
Brooklyn, N. Y.

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BUSINESS REPLY CARD

No Postage Stamp Necessary if Mailed in the United States

2c – POSTAGE WILL BE PAID BY –

FRANK FOX, President
REALTY ASSOCIATES SECURITIES CORPORATION
162 Remsen Street,
Brooklyn, N. Y.

Certificate of Referee Dated March 31st, 1934.

The relevant portions of the certificate in substance recite: 193

That the total claims of creditors filed, scheduled and allowed are $13,008,038.30.

That the total number of creditors involved are 3,363.

That claims which are not based on presently outstanding bonds are $208,133.90.

That written acceptances to the offer of composition have been filed by 2,235 creditors whose claims aggregate the sum of $9,380,973.09.

That the composition as modified has been accepted by a majority in number of all creditors 194 whose claims have been allowed, which represent majority in amount of said claims and the composition is recommended for confirmation.

Statement Concerning Hearing on Composition.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24,860.

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In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

The following is a true statement of the substance of the proceedings before Hon. Clarence G. Galston, *D. J.*, at the hearing held on March

Statement Concerning Hearing on Composition.

196 23, 1934, upon the application of Realty Associates Securities Corporation for confirmation of the composition herein, in so far as the proceedings at said hearing are relevant to the appeals of Fred L. Gross and Hon. Eugene F. O'Connor, Jr.

1. The following parties were present or represented at said hearing:

FRED L. GROSS, ESQ., Receiver, in person.

REALTY ASSOCIATES SECURITIES CORPORATION, by Alfred T. Davison, Esq.; Robert P.
197 Levis, and Orrin G. Judd, of Counsel.

BONDHOLDERS' COMMITTEE OF WHICH FREDERICK S. ROBINSON IS CHAIRMAN, by William R. Bayes, Esq.

REALTY ASSOCIATES, INC., by James N. Rosenberg, Esq.

BONDHOLDERS' COMMITTEE OF WHICH WILLIAM E. KENNEDY, JR., IS CHAIRMAN, by Colby, Brown & Pollack; Edward D. Brown and Edgar A. Pollack, Esqs., of Counsel.

BROOKLYN TRUST COMPANY, a Creditor, by Messrs. Cullen & Dykman, Esqs.; Ralph
198 W. Crolly, Esq., of Counsel.

ELIZA B. CARMAN AND OTHERS, Creditors, by Archibald M. Palmer, Esq.

HOMER E. PALMER, Creditor, by Samuel M. Brook, Esq.

MR. MORRIS STEINER, Creditor, in person.

2. The attorney for the Bankrupt (Mr. Levis speaking for Mr. Davison, who was suffering from an attack of laryngitis), and the attorney for Realty Associates, Inc., explained the terms

of the offer of composition, and the modification 199
which had been made as a result of Judge Campbell's order dated January 5, 1934, and stated that the offer of composition was identical with that which had been presented to Judge Campbell, and which Judge Campbell had found to be in the best interest of creditors, with the exception that pursuant to the requirements of said order, as affirmed by the Circuit Court of Appeals, there had been eliminated from the offer of composition the provisions for payment of the fees and allowances to certain attorneys and committees.

3. Various representatives of creditors spoke 200
concerning the composition, and all favored confirmation of the composition as in the best interest of creditors, except Samuel M. Brook, who filed specifications of objection on behalf of one Homer E. Palmer; exceptions to said specifications were filed on behalf of Realty Associates Securities Corporation in which Realty Associates, Inc. joined, and also on behalf of Eliza B. Carman, et al.; after the taking of testimony of Hon. Eugene F. O'Connor, Referee, and after argument, the second of said specifications was overruled for failure of proof, and decision was re- 201
served on the exceptions filed to the remaining three specifications.

4. The attorneys for the Bankrupt, Realty Associates, Inc., Eliza B. Carman, et al., and Homer E. Palmer, argued in opposition to the fees requested by the Receivers and the Referee, stating their contentions as to the legal rules applicable. It was not disputed that the business was ably conducted by the Receivers, and that

202 their efforts had been decidedly of advantage to the estate, but it was urged that their compensation should be limited in accordance with the standard of the *Claflin* case (231 Fed. 693), and in conformity with the true interpretation of the applicable statutes.

5. The attorneys for the Bankrupt filed the following affidavits with reference to the market value of the bonds, both before and after the reduction and modification thereof, pursuant to the provisions of the offer of composition as modified:

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(a) Affidavit of Charles D. Pulis, sworn to March 22, 1934.

(b) Affidavit of Arnold R. Hanson, sworn to March 22, 1934.

(c) Affidavit of Milton Jacobs, sworn to March 23, 1934.

Said affidavits were received without objection from any party. The Court directed that copies thereof be given to Mr. Gross *and asked if anyone wished to submit additional proof.

204 The Court stated that it would give Mr. Gross, Receiver, and the Referee an opportunity *to answer anything said on the subject of fees and also to file memoranda in support of their position on the subject of fees. Mr. Gross accordingly addressed the Court on the subject and

*Note: The words "asked if anyone wished to submit additional proof", appearing in the last two lines of the next to the last paragraph above, and the words "to answer anything said on the subject of fees", appearing in lines 3 and 4 of the last paragraph above, do not appear in the reporter's stenographic minutes of the hearing and are here included at the direction of the Court after consultation and discussion with counsel. To this ruling the appellants take exception.

submitted a memorandum in support of his contentions. 205

6. Mr. Crolly stated that he left the matter of fees to the Court for determination.

7. Mr. Morris Steiner, a bondholder, addressed the Court, and stated that the applications for allowances were in his judgment excessive, and requested the Court to reduce them for the benefit of creditors.

8. The attorneys for the Bankrupt read to the Court the letter dated February 23, 1934, which 206
Realty Associates Securities Corporation had sent to its Bondholders, requesting an expression of opinion as to the composition, being the same letter annexed to the application for confirmation, verified March 13, 1934, and stated that 1700 bondholders, holding an aggregate of $5,013,000 in bonds had asked, over their own signatures, that the composition be approved, and that only 36 bondholders representing $72,300 in bonds were opposed.

9. Mr. Gross, the Receiver, addresed the Court on the subject of his possible tax liability and 207
requested that the order of confirmation contain some provision for the protection of the Receivers with regard to income taxes. He stated that he had made a return, which the government had accepted as a tentative return, and that, under the rulings, he was obliged to make a return for the entire year. He also stated that not all taxes antecedent to the receivership had been attended to. Mr. Gross contended that there might be additional claims arising subsequent to the

208 order of composition out of the filing of returns by the Receiver for 1933 and possibly for 1934 up to the discharge of the Receiver. Mr. Gross stated that he had not been able to get any definite ruling from the Revenue Department on that question; that he did not know how far he would be liable to keep a reserve for 1934 taxes up to the conclusion of the receivership.

The attorneys for the bankrupt stated that, in accordance with the usual practice in bankruptcy compositions, this matter could be taken care of by providing in the order that the Receiver be
209 released from liability for taxes for the year 1934 and that the return for the entire year be made by Realty Associates Securities Corporation; that such order could be served upon the Collector of Internal Revenue, who already had notice of the application for composition, and that the government would be bound by the decree; that as soon as the Receiver turned over the assets to the bankrupt and was discharged, if no claims were then made against him by the United States government, he certainly was under no liability; and that the government had already withdrawn certain claims and consented to look to the assets
210 returned to the bankrupt and not to the bankrupt's estate for payment of such claims.

Mr. Gross stated that he did not agree with what the bankrupt's attorneys had said about the Court's power to lift from the Receiver the obligation to pay taxes and transfer them to the bankrupt; that his understanding was that the only power that the District Court had in connection with income taxes was to require the Collector of Internal Revenue to make an immediate assessment of the taxes, so that at the

earliest possible time it might be shown whether 211
there was any deficiency assessment to be made and so that the Receiver might meet it. He stated that it was a personal obligation of his to see that such payment was made and that he did not believe that he could escape it.

The Court stated that it would have the matter in mind.

10. The Referee was present and did not address the Court.

Affidavit of Arnold R. Hanson. 212

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

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State of New York,
City of New York,
County of New York—ss.:

ARNOLD R. HANSON, being duly sworn, deposes and says: I am a partner of the firm of Hanson & Hanson, dealers in investment securities at No. 25 Broadway, New York City.

My firm and myself for many years have been securities brokers and during all that time I have been, and now am, engaged in the buying and

214. selling in the City of New York and its environs, of bonds and stocks of all kinds.

I am especially familiar with the bonds issued by Realty Associates Securities Corporation under the three indentures dated respectively July 1, 1925, December 1, 1927 and October 1, 1928, and have been dealing in these bonds ever since their issuance. I may say that my firm is probably the most active dealer in these securities.

My firm has acted as broker in the purchase and sale of said bonds from time to time during the past several years and, particularly, at or about December 21, 1933 and February 28th, 1934 and
215 at the present time.

In addition to acting as broker in the actual purchase and sale of said bonds, I also make it my business to be familiar at all times with the prices at which said bonds have been bought and sold by others than through myself as broker. I obtain this information in various ways, including the following:

My firm is a subscriber to the National Daily Quotation Service and receives their sheets with daily prices. This gives me information of current prices from day to day. In addition, I have
216 been in daily touch with other brokers who are handling such securities and have noted the prices at which they have been trading same.

I know of my own knowledge that the prices at which the above mentioned bonds of Realty Associates Securities Corporation have been sold subsequent to December 21, 1933 and subsequent to February 28th, 1934, have ranged from about $240 to $370 per $1000 of face value of bonds.

Particularly, but not limiting the above statement, I cite the following sales on the following

dates on which my firm actually transacted sales in the said bonds. (The following prices are based on sales of bonds of $1000 face value): 217

Date	Price	Quantity of Bonds
December 1, 1933	28	2
5,	28½	1
14,	29¼	2
21,	27½	6
27,	28½	2
February 20, 1934	24¼	1
21,	25¼	3
23,	25	1
March 2,	29	1
13,	32	3
14,	34	2
16,	35	13
20,	35½	10
21,	37	3

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At the present time, including the date on which I am swearing to this affidavit, the bid and asked prices of said bonds are:

Issue	Bid	Asked
July 1, 1925	36½	37½
December 1, 1927	36½	37½
October 1, 1928	36½	37½

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I further state of my own knowledge that the market value of the bonds above mentioned as of the present time is not more than about $370 per $1,000 of face value of bonds. This market value of $370 per $1000 bond above mentioned is the market value of said bonds in a market which has knowledge of the fact that a composition is now pending confirmation under which the holders of

220 said bonds will be entitled after such confirmation to receive a payment of 15% of the face amount of said bonds, with interest computed thereon to July 10, 1933.

In my opinion after the 15% has been paid on account of said principal and interest on said bonds, said bonds will have a market value of about $220 per bond of a reduced face value of 85% of the face amount originally due thereon, with interest computed to July 10, 1933.

Specifically in my opinion the market value of each $1000 bond of Realty Associates Securities Corporation after the payment of said 15%, will
221 be about $220; the value of each $500 bond after the payment of said 15%, will be about $110; and the market value of each $100 bond after the payment of said 15% will be about $22.

ARNOLD R. HANSON.

Subscribed and sworn to before me
this 22nd day of March, 1934.

ROBERT EBLE,
Notary Public, Kings Co, No. 104.
Cert. filed in New York Co. No. 27.
222 Commission expires March 30, 1935.

Affidavit of C. D. Pulis.

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UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

State of New York,
City of New York,
County of New York—ss.: 224

C. D. PULIS, being duly sworn, deposes and says: I am the senior member of the firm of C. D. Pulis & Company, doing business as investment brokers at 25 Broad Street, New York City.

I am and for over one year and three-quarters last past, have been a securities broker and during all that time I have been and now am engaged in the buying and selling in the City of New York and its environs, real estate securities.

I am familiar with the bonds issued by Realty 225
Associates Securities Corporation under the three indentures dated respectively July 1, 1925, December 1, 1927 and October 1, 1928.

I have acted as broker in the purchase and sale of said bonds from time to time during the last year and three-quarters, and particularly subsequent to December 21, 1933 and subsequent to February 28, 1934.

In addition to acting as broker in the actual purchase and sale of said bonds, above mentioned,

226 I also make it my business to be familiar at all times with the price at which said bonds have been bought and sold by others than through myself as broker. I obtain this information in various ways including the following:

I am a subscriber to the National Quotation Bureau and receive their sheets with daily prices. This gives me information of current prices from day to day. In addition, I have been in daily touch with other brokers who are handling such securities and have noted the prices at which they have been trading same.

227 I know of my own knowledge that the prices at which the above-mentioned bonds of Realty Associates Securities Corporation have been sold subsequent to December 21, 1933 and subsequent to February 28, 1934, have ranged from $250 to $360 per $1000 of face value of bonds.

Particularly, but not limiting the above statement, I cite the following sales on the following dates of which I have knowledge (the following prices being based on sales of bonds of $1000 face value):

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Date		Price	Quantity
December	11, 1933	28-½	$3000.
	12, 1933	28-¼	2000.
	27, 1933	28	1800.
January	6, 1934	25-½	500.
	9, 1934	25	2000.
February	13, 1934	25-¼	800.
	13, 1934	25-½	1000.
	28, 1934	27	1000.
March	2, 1934	27-½	1000.
	6, 1934	30	500.

5, 1934	30-½	1000.
16, 1934	33	1000.
16, 1934	34-¼	1500.
19, 1934	36	1100.
21, 1934	36	1000.

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At the present time, including the date on which I am swearing to this affidavit, the bid and asked prices of said bonds are:

Issue		Bid	Asked
July	1, 1925	36-½	37-½
December	1, 1927	36-½	37-½
October	1, 1928	36-½	37-½

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I further state of my own knowledge that the market value of the bonds above mentioned as of the present time is not more than about $370 per $1,000 of face value of bonds. This market value of $370 per $1,000 bond above mentioned is the market value of said bonds in a market which has knowledge of the fact that a composition is now pending confirmation under which the holders of said bonds will be entitled after such confirmation to receive a payment of 15% of the face amount of said bonds, with interest computed thereon to July 10, 1933.

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In my opinion after the 15% has been paid on account of said principal and interest on said bonds, said bonds will have a market value of about $220 per bond of a reduced face value of 85% of the face amount originally due thereon, with interest computed to July 10, 1933.

Specifically in my opinion the market value of each $1000 bond of Realty Associates Securities Corporation after the payment of said 15%, based

232 on the present market price, will be about $220; the value of each $500 bond after the payment of said 15%, will be about $110; and the market value of each $100 bond after the payment of said 15% will be about $22.

C. D. PULIS.

Subscribed and sworn to before me this 22nd day of March, 1934.

EDITH POWELL,
Notary Public.
N. Y. Co. Clk's No. 110, N. Y. Co. Reg. No. 4-P-156.

233 My Commission Expires March 30, 1934.
(Seal)

Affidavit of Milton Jacobs.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

234 REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

State of New York,
County of Kings—ss.:

MILTON JACOBS, being duly sworn, deposes and says:

I reside at No. 1249—41st Street, Brooklyn, N. Y.

Affidavit of Milton Jacobs.

I have prepared and set forth below a table showing the bid and asked prices on bonds of Realty Associates Securities Corporation, bankrupt herein. As the table shows, I obtained these figures from the New York Times and the Commercial & Financial Chronicle. It is needless to say that both these two publications are highly regarded in financial circles and their reputation for reliability and accuracy is second to none.

Date	Periodical	Issue	Bid	Asked
February 15, 1934	N. Y. Times	6s '37	24	26
16,	" " "	6s '37	24	26
16,	Chronicle	6s '37	23½	26
17,	N. Y. Times	6s '37	23½	26
18,	" " "	6s '37	23½	26
20,	" " "	6s '37	23½	26
21,	" " "	6s '37	23½	26
22,	" " "	6s '37	24	26
23,	Chronicle	6s '37	24	26
24,	N. Y. Times	6s '37	24	26
25,	" " "	6s '37	24½	26
27,	" " "	6s '37	24½	26
March 1,	" " "	6s '37	24½	26
2,	Chronicle	6s '37	27	—
2,	N. Y. Times	6s '37	24½	26
3,	" " "	6s '37	27	—
4,	" " "	6s '37	27	—
6,	" " "	6s '37	27	—
7,	" " "	6s '37	32	—
8,	" " "	6s '37	32	—
9,	" " "	6s '37	31½	—
9,	Chronicle	6s '37	31	34
10,	N. Y. Times	6s '37	31	34
11,	" " "	6s '37	30½	34
13,	" " "	6s '37	30½	34
14,	" " "	6s '37	30½	34

Affidavit of Milton Jacobs.

Date	Periodical	Issue	Bid	Asked
15,	" " "	6s '37	30	34
16,	" " "	6s '37	31	34
16,	Chronicle	6s '37	31	34
17,	N. Y. Times	6s '37	31	34
18,	" " "	6s '37	31	34
20,	" " "	6s '37	34	—
21,	" " "	6s '37	34	—

I obtained the data in the above table from back numbers of the publications and verily affirm that all the information therein set forth has been truly and correctly copied from the said two publications.

MILTON JACOBS.

Sworn to before me this
23rd day of March, 1934.

JOHN L. LOESEL,
Notary Public,
Kings County.
Kings Co. Clerk's No. 548, Register's No. 5234.
Certificate filed in Nassau County.
Term expires March 30, 1935.

Affidavit of Orrin G. Judd.

241

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

242

State of New York,
County of Kings—ss.:

ORRIN G. JUDD, being duly sworn deposes and says:

I make this affidavit in connection with the computation of the commissions of Fred L. Gross and Frank Fox as Receivers in bankruptcy of said Realty Associates Securities Corporation.

I am informed from the books of the Receivers that the total amount of moneys disbursed or turned over to any person, including lienholders, by said Fred L. Gross and Frank Fox, as Receivers, from the date of bankruptcy, July 10, 1933, to the date of Mr. Fox' withdrawal as Receiver, January 4, 1934, is $2,534,145, including the sum of $2,255,000. deposited with the Clerk of the United States District Court for the Eastern District of New York, prior to December 18, 1933, pursuant to order of said court for the purpose of carrying out the composition offered by

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244 the bankrupt. The total amount of moneys so disbursed by the Receivers between July 10, 1933, and March 22, 1934, including the amount of $2,534,145 aforesaid, is $2,698,280.99.

ORRIN G. JUDD.

Sworn to before me this
23rd day of March, 1934.

JOHN L. LOESEL,
Notary Public,
Kings County.

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246

Affidavit of John L. Loesel.

247

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER

—of—

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

State and City of New York,
County of Kings—ss.: 248

JOHN L. LOESEL being duly sworn, says: I am head bookkeeper for the Receiver in the above entitled proceeding.

The annexed statement is a correct statement of the cash receipts received by, and disbursements made by, the receivers up to March 15th, 1934.

JOHN L. LOESEL.

Sworn to before me this
27th day of March, 1934. 249

WILLIAM F. BEHRENS,
Notary Public, Richmond County,
Cert. filed in Kings Co. No. 204, Reg. No. 6226,
Cert. filed in Queens Co. No. 217, Reg. No. 1727.
Commission expires March 30, 1936.

(Seal)

STATEMENT, ANNEXED TO AFFIDAVIT OF JOHN L. LOESEL.

250

ESTATE OF REALTY ASSOCIATES SECURITIES CORPORATION, ALLEGED BANKRUPT — FRED L. GROSS, RECEIVER.

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS JULY 10, 1933 — MARCH 15, 1934

Cash in Banks July 10, 1933			
Title Guarantee & Trust Company		$ 100,550.96	
Brooklyn Trust Company		650,588.08	
Manufacturers Trust Company		222,054.87	$ 973,193.91

Cash Receipts	Ordinary Receipts	Receipts from Sale of Securities	Total Receipts
July 10 — July 31, 1933	$ 80,941.79	$ —	$ 80,941.79
Aug. 1 — Aug. 31, 1933	214,145.85	135,000.00	349,145.85
Sept. 1 — Sept. 30, 1933	179,687.06	300,000.00	479,687.06
Oct. 1 — Oct. 31, 1933	133,324.17	—	133,324.17
251 Nov. 1 — Nov. 30, 1933	117,704.30	—	117,704.30
Dec. 1 — Dec. 31, 1933	114,538.81	433,866.25	548,405.06
Jan. 1 — Jan. 31, 1934	107,304.88	—	107,304.88
Feb. 1 — Feb. 28, 1934	107,065.85	675,727.50	782,793.35
Mar. 1 — Mar. 15, 1934	82,472.47	—	82,472.47
	$1,146,185.18	$1,544,593.75	$2,690,778.93

Disbursements			
July 10 — July 31, 1933		$ 20,725.64	
Aug. 1 — Aug. 31, 1933		65,930.56	
Sept. 1 — Sept. 30, 1933		36,977.31	
Oct. 1 — Oct. 31, 1933		61,053.26	
Nov. 1 — Nov. 30, 1933		67,624.18	
Dec. 1 — Dec. 31, 1933		24,094.57	
Jan. 1 — Jan. 31, 1934		80,304.78	
Feb. 1 — Feb. 28, 1934		67,210.94	
Mar. 1 — Mar. 15, 1934		26,533.29	450,454.53
Net Receipts			2,240,324.40
252 Balance March 15, 1934			$3,213,518.31

Cash in banks and on deposit with United States District Court Clerk — March 15, 1934	
Title Guarantee & Trust Company	$ 252,620.37
Brooklyn Trust Company	180,719.04
Manufacturers Trust Company	125,178.90
National City Bank	100,000.00
Bank of Manhattan Trust	100,000.00
Chase National Bank	100,000.00
Chemical National	50,000.00
Lawyers County Trust Co.	50,000.00
U. S. District Court Clerk	2,255,000.00
	$3,213,518.31

Order Appealed From Confirming Composition, as Modified.

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IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

254

An application for the confirmation of the composition offered by the bankrupt dated October 26, 1933, as modified by instrument dated February 16, 1934, executed by the bankrupt, having been filed in Court and it appearing that said composition as so modified has been accepted by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; and the consideration to be paid by the bankrupt to its creditors and the money required by law to be deposited, having been deposited as ordered, in 255
such places as were designated by a Judge of this Court and subject to the order of the Court; and the court being satisfied that said composition as so modified, is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to its discharge, and that the offer, as so modified, and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by the acts of Congress relating

256 to bankruptcy; and due notice having been heretofore given to all the creditors of the bankrupt and all parties in interest that a hearing on the application for an order confirming the composition proposed by the above named bankrupt by its offer of composition dated October 26, 1933, as so modified by instrument dated February 16, 1934, has been fixed by order of this Court for March 23, 1934, at 10:30 A. M. in Room 214 in the Post Office Building, Borough of Brooklyn, Kings County, City and State of New York, and
257 said notice having also been published in the Brooklyn Daily Eagle, and the Brooklyn Times Union on March 14, 1934 and March 21, 1934, and the hearing on said application having been duly had before the undersigned on said 23rd day of March, 1934, and no one having entered his appearance in opposition to the confirmation of said composition, as so modified, and at the same time filed a specification in writing on the ground of his opposition, except that specifications of objections were filed by Samuel M. Brook, Esq., on behalf of one Homer E. Palmer, on said 23rd day of March, 1934 and amended by instrument
258 dated March 26th, 1934, and exceptions to said specifications having been filed by Eliza B. Carman (Archibald M. Palmer, of Counsel) and by the bankrupt (Alfred T. Davison, attorney), Realty Associates, Inc., a creditor, joining in said exceptions filed by bankrupt, and evidence having been heard by this Court in support of the second specification filed by said Samuel M. Brook, and said second specification having been overruled for failure of proof, and the exceptions to the remaining specifications filed by said Samuel M.

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Brook having been sustained, and said specifications having been dismissed as insufficient in law;

AND Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, having withdrawn as of December 21, 1933 the supplemental claims for taxes for the years 1928, 1930 and 1932, which said withdrawal does not affect the original claim filed in the above entitled proceeding for income tax for the year 1931, for which the bankrupt has heretofore deposited with the Clerk of this Court $149,896.84 and to which said claim the bankrupt has duly filed objections and which objections have not yet been heard or determined;

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AND the application for the confirmation of said offer of composition, dated October 26, 1933, having come on to be heard before a Judge of this Court on December 21, 1933, and said District Judge having filed his opinion dated December 30, 1933 provisionally denying the confirmation of said offer of composition on the ground that the Court could not confirm the composition with the agreement therein contained to pay

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> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the court may fix or approve."

forming a part thereof and said opinion having

262 directed that the matter be returned to the Referee to determine whether a majority of the creditors would accept the composition with the said provision last above quoted eliminated therefrom, and an order in accordance with said opinion of said District Judge having been made and entered on January 5, 1934, and the Bankrupt and certain creditors and creditors' committees having appealed from said order dated January 5, 1934, and the United States Circuit Court of Appeals for the Second Circuit having on February 13, 1934 made
263 its decision affirming said order dated January 5, 1934, and the bankrupt having modified its offer of composition dated October 26, 1933 in accordance with the above mentioned opinion of the District Judge dated December 30, 1933 by eliminating therefrom the agreement by the bankrupt to pay

> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectively chairmen, and such fees and
264 disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the Court may fix or approve."

as set forth in the instrument executed by this bankrupt, dated February 16, 1934, so modifying its said offer of composition, dated October 26, 1933, and said offer of composition dated October 26, 1933 as so modified having been duly submitted to creditors and having been duly accepted by the creditors as hereinabove recited.

Order Appealed From Confirming Composition, as Modified.

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Now, upon the offer of composition dated October 26, 1933 as so modified by said instrument in writing dated February 16, 1934, and upon the indenture dated July 10, 1933 between Realty Associates Securities Corporation and Manufacturers Trust Company, an original counterpart of which said indenture was filed in the office of the Clerk of this Court on the 5th day of December, 1933, and upon the application for confirmation of said offer of composition verified December 5, 1933, the opinion of this Court thereon dated December 30, 1933, the order of this Court dated 266
January 5, 1934, provisionally denying said application and returning matter to the Referee to determine whether a majority of the creditors would accept the composition with the modifications therein referred to, the mandate of the United States Circuit Court of Appeals for the Second Circuit, filed herein February 28, 1934, affirming said order, the order of this Court entered on said mandate on March 13, 1934, the modification, dated February 16, 1934, of said offer of composition, dated October 26, 1933, executed by the bankrupt, the agreement between Realty Associates, Inc., and Realty Associates 267
Securities Corporation, referred to in subdivision marked 8 of the said offer as so modified, duly executed the 8th day of March, 1934, the certificate of Hon. Eugene F. O'Connor, Jr., Referee in Bankruptcy, dated March 13, 1934, filed in conformity with Bankruptcy Rule 13 of this Court, the affidavit of Alfred T. Davison, attorney for the bankrupt as to fees, sworn to March 9, 1934, the petition of Fred L. Gross, Receiver, for allowances, verified February 27, 1934, the affidavit of

Order Appealed From Confirming Composition, as Modified.

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Fred L. Gross, sworn to March 8, 1934, the affidavit of James Graham, sworn to March 9, 1934, the petition of Jacob A. Freedman, attorney for Frank Fox, Receiver, verified November 21, 1933, the supplemental petition of said Jacob A. Freedman, verified March 3, 1934, the petition and affidavit of Frank Fox, Receiver, verified March 2, 1934, the petition of Touche, Niven & Co., accountants, filed November 16, 1933, the supplemental petition of said Touche, Niven & Co., verified March 6, 1934, the letter of the bankrupt
269 dated March 12th, 1934, consenting to payments of $2,000 to said Jacob A. Freedman and $4,000 to said Touche, Niven & Co., and the Referee having claimed compensation by way of commissions on $13,008,038 and the bankrupt and certain creditors having duly objected to the computation of the compensation of the Referee on the basis of commissions on $13,008,038, and also upon the bankrupt's application, verified the 13th day of March, 1934, for confirmation of said composition as so modified, and the objections therein contained to the amounts of allowances requested by the Receivers and by the Referee, to the claim of
270 Almon G. Rasquin, Collector of Internal Revenue, for 1931 income taxes and to that portion of the claim of The Prudence Company, Inc., dated January 10, 1934, which is for the principal amount of $207,583.95, and on the order directing notice of hearing on said application for confirmation entered March 13, 1934, the certificate of the Clerk pursuant to Rule 13 of this Court, the affidavits of due publication of notice of the hearing upon said application, severally sworn to March 22, 1934, the letter of Almon G. Rasquin, Collector of Internal Revenue, dated December 21,

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1933, the letter of the bankrupt to its creditors dated February 24, 1934, and postal cards and letters received in reply thereto and received in evidence, at the said hearing before the undersigned, and upon the specifications filed by Samuel M. Brook, on behalf of Homer E. Palmer, dated March 22, 1934, as amended by instrument dated March 26, 1934, the exceptions thereto filed by the bankrupt and by Eliza B. Carman, the affidavits of Charles D. Pulis and Arnold R. Hanson, each sworn to March 22, 1934, and the affidavits of Milton Jacobs and Orrin G. Judd, each sworn to 272
March 23, 1934, the affidavit of John L. Loesel, sworn to March 27, 1934, and upon all the papers filed and proceedings had herein; and

After hearing Alfred T. Davison, attorney for the bankrupt, and Robert P. Levis, of counsel, in support of said application for confirmation, and in opposition to the amounts requested as allowances and as compensation of the Receivers and the Referee, and after also hearing Archibald M. Palmer, Esq., attorney for creditors and James N. Rosenberg, attorney for Realty Associates, Inc., a creditor, in support of said application for confirmation, and after hearing said James N. Rosen- 273
berg, in support of the exceptions to the specifications filed by Samuel M. Brook, Esq., and after hearing Samuel M. Brook, Esq., in support of said specifications and in opposition to the exceptions, and on the testimony of Eugene F. O'Connor, Jr., Referee, taken in open Court when called as a witness by Samuel M. Brook, and motion having been made by attorneys for creditors to dismiss said specifications of objections, and after hearing Archibald M. Palmer, Esq., and James N. Rosenberg, Esq., in opposition to the

274 amounts of fees and compensation requested by the Receivers and Referee, and Morris Steiner, Esq., a bondholder, also in opposition to the amounts of fees and compensation requested by the Receivers and Referee, and after hearing Samuel M. Brook, Esq., in support of his application for allowance and Robert P. Levis, Esq., in opposition thereto, and the attorney for the bankrupt in opposition thereto, and after hearing Fred L. Gross, Esq., in support of his application for allowance as one of the Receivers, and on the
275 subject of Federal and State Taxes,

AND due deliberation having been had, and on the opinion and decision of the undersigned District Judge dated and filed April 3, 1934, it is

ORDERED, that the specification of objection numbered "second" filed on behalf of Homer E. Palmer, be and the same hereby is overruled and dismissed on the merits and that the remaining specifications of objections filed on behalf of Homer E. Palmer be and the same hereby are overruled and dismissed and all exceptions thereto
276 be and the same hereby are sustained; and it is further

ORDERED (1), that the said offer of composition dated October 26, 1933, as modified by instrument dated February 16, 1934, be and it hereby is confirmed; and it is further

ORDERED (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts other than such debts as are based upon such proportion of the existing bonds of Realty

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Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified, and with jurisdiction to be retained and these proceedings to be held open for the purposes only of

(1) the final account of the Receivers;

(2) the passing upon and determination of the validity of and objection to the claims of (a) Almon G. Rasquin, Collector of Internal Revenue, for 1931 income tax 278
(b) The Prudence Company, Inc., as abovementioned and (c) any other claims to which objections may be filed by the bankrupt within ten days after the date of this order as hereinafter provided, and

(3) the making of such other and further orders respecting the distribution of the consideration of the composition and the carrying out of said offer of composition, as so modified, as may be necessary or appropriate; and

(4) the enforcement of any orders heretofore made by the Court or the Referee 279
herein,

and it is further

ORDERED (3), that Manufacturers Trust Company be and it hereby is appointed distributing agent to distribute the consideration and carry out the terms of said composition as so modified, all under the supervision and direction of the Clerk of this Court, the compensation, if

280 any, of Manufacturers Trust Company, to be paid by the bankrupt; and it is further

ORDERED (4), that the Clerk of this Court and said Manufacturers Trust Company, as distributing agent, shall forthwith cause suitable notice to be sent to the creditors of the bankrupt whose claims are based upon presently outstanding bonds issued under any of the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927
281 and October 1, 1928, notifying them that the said composition, as so modified, has been confirmed, and that upon presentation of their said bonds to Manufacturers Trust Company for notation of reduction by partial payment and for modification, as provided in said offer of composition as so modified, and the indenture between Realty Associates Securities Corporation and Manufacturers Trust Company, dated July 10, 1933 and referred to therein, payment will be made to such creditors of the 15% provided to be paid by the terms of said composition as so modified
282 by check signed by said clerk of this Court; and it is further

ORDERED (5), that the Clerk of this Court shall deliver to Realty Associates, Inc. upon its request and written receipt the bond and mortgage for $275,000 covering property of the Queens County Jockey Club, known as the Aqueduct Race Track, and referred to in subdivision marked "8" of the said offer of composition as so modified, together with the assignment thereof from the bankrupt to said Realty Associates, Inc. and shall

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certify to said Manufacturers Trust Company that Realty Associates, Inc. has received and accepted the said bond and mortgage on account and as part payment of the 15% due it in cash pursuant to the terms of the composition offer as so modified, as provided therein; and it is further

ORDERED (6), that the Clerk of this Court shall forthwith pay all debts which have priority except the debt of Almon G. Rasquin, as Collector of Internal Revenue for the First District of New York for income tax for the year 1931, to cover which the bankrupt has deposited with the Clerk 284
of this Court in cash the sum of $149,896.84, and the amount of said claim of Almon G. Rasquin as such collector shall be retained by the Clerk (as also provided in the letter of said Almon G. Rasquin, Collector of Internal Revenue, dated and filed herein December 21, 1933) until the validity thereof and the objections thereto have been finally determined and until any appeals with respect thereto shall be finally determined, unless said Collector of Internal Revenue and the bankrupt shall otherwise agree in writing, to be approved by the Court; and it is further

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ORDERED (7), that the Clerk of this Court shall deliver to Manufacturers Trust Company checks for payment of the 15% provided to be paid to creditors not entitled to priority, except that part of the claim of The Prudence Company, Inc., which is for the principal amount of $207,583.95, and except any other claims (not based on presently outstanding bonds of the bankrupt) to which objection may be filed within ten (10) days after the date of this order; and it is further

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ORDERED (8), that said Manufacturers Trust Company, as distributing agent; shall (a) upon presentation of the bonds of creditors whose claims have been proved and allowed and are based upon presently outstanding bonds of Realty Associates Securities Corporation, deliver to such creditors their respective checks, together with the scrip certificates to which they are entitled pursuant to the terms of the offer of composition as so modified, and shall also (b) simultaneously with the above, receive said bonds for notation
287 of reduction by partial payment and for modification (as so reduced), as provided in said offer of composition as so modified and the said indenture dated July 10, 1933, hereinabove recited, and said Manufacturers Trust Company as distributing agent shall also (c) forthwith deliver to such creditors whose claims are not based upon presently outstanding bonds their respective checks together with the scrip certificates and presently outstanding Treasury bonds (reduced and modified as provided in said composition offer as so modified) provided to be issued in accordance with, and to which they are entitled, pursuant to the
288 terms of said offer of composition as so modified; and it is further

ORDERED (9), that the Clerk of this Court shall pay to Manufacturers Trust Company, as Distributing agent, 15% of the amount of the claims allowed on behalf of said Manufacturers Trust Company, as Trustee under the three indentures between Realty Associates Securities Corporation and Manufacturers Trust Company, dated respectively July 1, 1925, December 1, 1927, and October 1, 1928, and that Manufacturers Trust Com-

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pany as distributing agent shall pay therefrom, upon presentation of bonds issued under such indentures, the holders of which have not filed and proved their claims, the 15% provided to be paid under the terms of said offer of composition, and deliver the scrip certificates to which such holders of such bonds are entitled, pursuant to the terms of the offer of composition as so modified, and said Manufacturers Trust Company shall also, simultaneously with the above, receive said bonds for notation of reduction by partial payment and modification (as so reduced), as provided in said offer of composition as so modified, and the said indenture dated July 10, 1933, hereinabove recited; and said Manufacturers Trust Company shall from time to time certify to said Clerk the date and amount of each such payment, and the name of the person to whom such payment was made; and it is further

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ORDERED (10), that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17, subject to being reduced by reason of claims objected to being reduced and disallowed, and the amount of compensation to which the Referee is entitled herein is hereby fixed at the sum of $24,064.87, subject to being reduced by reason of claims objected to being reduced and disallowed; and it is further

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ORDERED (11), that the Court hereby allows to the Receivers as compensation the total sum of $48,129.74 the same to be divided between them in the proportions of sixty percentum (60%) (viz. $28,877.84) to Fred L. Gross, as compensation

292 for his services as Receiver, and forty percentum (40%) (viz. $19,251.90) to Frank Fox, as compensation for his services during the time when he served as Receiver; and it is further

ORDERED (12), that the amounts to be paid as compensation to Jacob A. Freedman, attorney for Frank Fox, Receiver, and Touche, Niven & Co., accountants, be and the same hereby are fixed at the sum of $1,000 to said Jacob A. Freedman and $4,000 to said Touche, Niven & Co., and said amounts are hereby allowed and awarded to said
293 Jacob A. Freedman and Touche, Niven & Co., respectively; and it is further

ORDERED (13), that the petition of Samuel M. Brook, verified March 2, 1934, for allowance for certain creditors and their attorney for reasonable expenses by virtue of provisions of Section 64 B-4 of the Bankruptcy Act be and the same hereby is in all respects denied; and it is further

ORDERED (14), that the Clerk of this Court shall
294 forthwith pay all expenses of administration and of the composition, including the amounts agreed to be paid by the bankrupt to Alfred T. Davison, attorney for the bankrupt, as set forth in his above mentioned affidavit, and it is further

ORDERED (15), that Eugene F. O'Connor, Jr., Esq., be and he hereby is appointed Special Master to hear and report upon the objections to claims heretofore filed by Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, for income tax for the year 1931, the ob-

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jection to that part of the claim of The Prudence Company, Inc., dated January 10, 1934, which is for the principal amount of $207,583.95, as more particularly set forth in the objections filed by the bankrupt, dated February 27, 1934; and any additional objections to any claims not based upon presently outstanding bonds of the bankrupt, which may be filed hereafter, provided that any such additional objections shall be filed with the Clerk of this Court within ten days after the date of entry of this order; and it is further

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ORDERED (16), that all objections heretofore made and the right to make any and all objections to the claim of Almon G. Rasquin, as Collector of Internal Revenue for the First District of New York, are hereby reserved to Realty Associates Securities Corporation; and it is further

ORDERED (17), that any and all claims of the Collector of Internal Revenue or the United States for taxes shall not in any manner be affected or discharged by this composition and this order and the confirmation of said composition is and shall be without prejudice to any claim or debt heretofore or hereafter claimed or asserted by said Collector of Internal Revenue or the United States against Realty Associates Securities Corporation for taxes and the said Collector of Internal Revenue or the United States shall notwithstanding this composition have the right to assert or levy any tax and file and assert any lien to which he or it may be entitled against the assets of Realty Associates Securities Corporation with such priority thereunto attaching as they may be entitled to by law; and it is further

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ORDERED (18), that after making the payments heretofore directed to be made and setting aside all amounts herein ordered to be retained, and making payments after any appeal, the Clerk of this Court shall from time to time return the balance of the consideration deposited herein to the bankrupt or its attorney; and it is further

ORDERED (19), that Fred L. Gross as Receiver in Bankruptcy herein shall immediately turn over to the Bankrupt all assets of the bankrupt estate in his possession, subject to the payment of any
299 unpaid obligations incurred by the said Receivers other than those which under the rules require the approval of the Court, so that all real estate, mortgages, installment contracts, securities, money, personal property, choses in action and all property and assets of the bankrupt, except such money out of said moneys deposited by the bankrupt pursuant to the order of the Judge as may be necessary to make the payments required by this order, shall revest in said Realty Associates Securities Corporation upon the entry of this order; and it is further

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ORDERED (20), that said Receivers shall file within thirty days with the Clerk of this Court, unless such time is further extended by order of this Court, their accounts in conformity with Rule 13 of the Bankruptcy Rules of this Court; and this Court hereby retains jurisdiction of this matter until the final determination of such accounting by the Receivers;

AND Notice of Settlement of this order having been served upon Almon G. Rasquin, Collector of

301

Internal Revenue for the First District of New York; it is further

ORDERED (21), that said Fred L. Gross and Frank Fox, as Receivers in bankruptcy herein and each of them is not liable for the payment of any taxes owing by or assessed against the Receivers, or either of them, or the bankrupt or its property by the United States or any State or municipality arising out of or in connection with the business of Realty Associates Securities Corporation and any and all such taxes shall remain and 302
shall be solely an obligation of Realty Associates Securities Corporation; and it is further

ORDERED (22), that this Court reserve the right to make from time to time without further notice to creditors, such other and further orders respecting the distribution of the consideration of the composition, the determination of claims, compensation and commissions, and payments of any kind, and of objections thereto, and also respecting the carrying out of said offer of composition as so modified, as may be necessary or appropriate; and it is further 303

ORDERED (23), that any party or person having an interest may at any time and from time to time apply at the foot of this order for such further orders, as may be necessary and proper herein with respect to the matters of which the Court has retained jurisdiction under the terms hereof.

Dated, Brooklyn, N. Y., April 6th, 1934.

CLARENCE G. GALSTON,
United States District Judge.

Opinion by Galston, *D. J.*

304

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24860.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

305

April 3, 1934.

ALFRED T. DAVISON, ESQUIRE, Attorney for Bankrupt (Robert P. Levis, Orrin G. Judd and Alfred T. Davison, Esquires, of Counsel).

JAMES N. ROSENBERG, ESQUIRE, Attorney for Realty Associates, Inc.

KRAUSE, HIRSCH & LEVIN, ESQUIRES, Attorneys for Referee (George C. Levin, Esquire, of Counsel).

306 FRED L. GROSS, ESQUIRE, Receiver, appearing in person.

COLBY, BROWN AND POLLACK, ESQUIRES, Attorneys for Bondholders' Committee (Edward W. Brown and Edgar A. Pollack, Esquires, of Counsel).

CULLEN AND DYKMAN, ESQUIRES, Attorneys for Brooklyn Trust Co. (R. W. Crolly, Esquire, of Counsel).

GALSTON, *D. J.*: 307

This is an application to confirm the composition offered by the bankrupt following the affirmance by the United States Circuit Court of Appeals, of the order of Judge Campbell entered January 5th, 1934.

The offer in composition is similar to that which was submitted to Judge Campbell with the exception that there was eliminated from the offer, following the entry of the mandate of the Circuit Court of Appeals, the provision which called upon the bankrupt to pay

308

> "such compensation and expenses of the three bondholders committees, of which William E. Kennedy, Jr., J. Lester Fierman, and Frederick S. Robinson are respectfully chairmen, and such fees and disbursements of their respective counsel, including counsel for the Manufacturers Trust Company, in such amounts as the court may fix or approve."

The modified offer of composition was presented to the creditors before the referee, to whom the case was referred and he has rendered his report. 309
Creditors, in majority and amount, are in favor of this composition. Total claims are $13,008,038.30.

Specifications of objections to the composition were filed on behalf of one Homer E. Palmer of San Luis Obispo, Cal., by Samuel M. Brook, Esquire, as his attorney. Exceptions to the sufficiency of these specifications were filed on behalf of the bankrupt, and by certain creditors of the bankrupt. The claim of the objecting creditor, Palmer, is $1049.

310 The exception to the first specification is sustained on the ground that the specification does not set forth an act which would be a bar to the confirmation of the composition. It alleges, among other matters, that the bankrupt, prior to the date of the filing of the petitions entered into a conspiracy with others to defraud creditors of the bankrupt and to conceal its assets and fraudulently to dispose of the same and to put through a composition not for the best interests of creditors. But there are no facts alleged which would fairly apprise the bankrupt of the charge made.
311 The allegations are vague and indefinite.

The second specification alleges that a fair opportunity was not accorded to these creditors to examine the bankrupt, in that the meeting of creditors before the referee was disorderly; "that bedlam reigned, boos and catcalls, hand clapping, loud and angry discussions and an attempted assault were some of the constant interruptions of the attempt to examine the bankrupt". Testimony taken at the hearing of the offer of composition in open court resulted in a dismissal of this specification for failure of proof.

312 The third and fourth specifications set forth that the composition is not in the best interests of the creditors. This composition was twice accepted by a majority in number of all creditors whose claims have been allowed, representing also an overwhelming majority, in amount, of such claims. If the composition were against the best interests of creditors holding claims aggregating $13,008,038.30, one would except opposition from creditors holding more than an obligation of $1049. But aside from the insignificance of this claim, a fair consideration of the merits of the

offer leads to the conclusion that it is in the best 313
interests of the creditors. The bankrupt deals in first and second mortgages. The present economic condition of the country in general, and the market in real estate in particular, leads to the belief that if its assets are to be liquidated on any fair expectation of a return to its creditors and stockholders, they should be liquidated over a period of years, rather than through a forced sale in the present market.

Accordingly, the exceptions to the third and fourth specifications are likewise sustained.

Since I find that the composition offer is for 314
the best interests of creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to its discharge, and since the offer and its acceptance appear to have been made in good faith, as provided for in Section 12 of the Bankruptcy Act (Title 11, U. S. C., Sec. 30) and not by means of any promises or acts therein forbidden, the composition is confirmed.

There remains for consideration the important questions of proposed allowances to the referee, the receivers and some miscellaneous allowances. 315

The referee has calculated his commissions on the basis of $13,008,038.30. To this, both the bankrupt and creditors object. The question involved turns on an interpretation of Section 40 of the Bankruptcy Act (Title 11, Section 68, U. S. C.). That section provides that the compensation of the referee is to be "one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition".

It is contended, on the one hand, by the referee that the amount to be paid to creditors is 100%

316 of their claims; and since the amount of these claims is $13,008,038.30 he asserts that he is entitled to $65,049.19. Those in opposition say, on the other hand, that the only amount to be paid to creditors *upon the confirmation* is 15%, not 100%.

I am unable to agree with either of these positions. Under the terms of the composition the creditors are to receive 15% in cash, and (with the exception of five creditors holding claims aggregating $208,133.90*) are to retain their bonds under certain modifications thereof which are to
317 be endorsed upon those bonds. The offer in composition says:

> "The remaining eighty-five percent (85%) of the amount [on] which said fifteen percent (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided."

The affect is to keep alive the old debt modified in the following major particulars:

(a) The maturity of the three issues involved
318 is extended to October 1st, 1943, as against respective maturities of July 1st, 1935, December 1st, 1937, and October 1st, 1938.

(b) The interest rate is 5% instead of 6%.

(c) Bondholders are given a representation of four directors on a Board of twelve.

However one may view the transaction, 85% of the old debt persists. It is not discharged. It

* These creditors under the offer are to receive 15% cash and 85% in treasury bonds.

survives in a modified form. To assert that ac- 319
ceptance of the offer of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the Court.

On the other hand, to assert the extreme position that the amount paid on composition is but the 15% paid in cash, is equally unfair. Again, in all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition.

Some proof in the form of affidavits has been 320
submitted on this motion from which it appears that the market value, based on actual sales known to the affiants, brokers who deal in such securities, is 37. When 15% of the face value of the bond is paid, these brokers believe that the present market value of the bond will be 22. I accept that figure despite the fact that the bond will bear interest no longer at 6% but only at 5%; but I feel that such loss will be at least offset by the sentimental value attached to the bond of a going, rather than of a defunct, corporation.

In reaching the foregoing conclusion I have 321
done so only after a careful reading of authorities submitted by both sides. The referee cites *In re Batterman Co.*, 231 Fed. 699. In this case it appears that the bankrupt offered a composition of 65% in cash, which offer was accepted. Later a body of creditors holding notes of the bankrupt to the order of H. B. Claflin Co. and endorsed by it, waived in writing the deposit of cash which the court required under Section 12(b) of the Bankruptcy Act. On the same day they also waived payment of their claims upon confirmation

322 of the composition. Subsequently, the referee reported to the court in favor of confirming the composition, and the court on confirmation directed the bankrupt to deposit cash with the clerk to cover the costs of the proceedings and the claims of creditors who had not waived the deposit of 65% in cash. The note creditors were parties to the plan of reorganization of the H. B. Claflin Co., and under it exchanged their notes for 15% of the same in cash paid by the H. B. Claflin Co., and the balance of 85% in notes of another corporation, the Mercantile Corporation. The
323 question presented to the court was the determination of the question as to whether the referee was entitled to commissions on the claims of the note creditors. The court said:

> "Now, without knowing the precise considerations which moved the parties respectively in the reorganization of this very large and complicated corporate system, it is not to be supposed that the H. B. Claflin Corporation, and the Mercantile Stores Corporation, the parties who took it over, gave cash or notes to the note creditors of the
> 324 alleged bankrupt for their claims without some consideration to them from it or from some one on its behalf, whether for value or gratuitously makes no difference. In short, we think the 15 per cent. cash and the 85 per cent. in notes are to be regarded as equivalents of the 65 per cent. of the claims in cash which was to be paid under the composition agreement, and that the proceeding is to be treated throughout as if 65 per cent. of the claims in cash had

been deposited with the court 'to be paid' to the note creditors." 325

The most then that the *Batterman* case shows is that the offer in composition contemplated the deposit of cash; that some creditors waived the cash provision but that such waiver was immaterial in the calculation of the referee's compensation. No such situation is presented in the present case.

Kinkead v. *J. Bacon & Sons et al.*, 230 Fed. 362, is the other main reliance of the referee. This case also dealt with the matter of waiver of deposit, and is of no greater relevancy than the *Batterman* case. The opinion states: 326

"On the contrary, the note holders' committee's acceptance of the composition offer (filed contemporaneously with the 'waiver of deposit') accepted in express terms 'the offer of composition at 35 per cent. to be made herein by * * * the above named bankrupt * * * and payable in cash'; and the waiver itself was limited to 'the deposit of money necessary to apply for the confirmation of said composition'. Beyond doubt the creditors in question, notwithstanding their waiver of deposit, could enforce such payment in cash by the bankrupt. The latter's discharge by virtue of the composition proceedings would destroy the remedy in bankruptcy, but not the debt for the consideration to be paid under the composition. Bankruptcy Act, Section 14c; *Zavelo* v. *Reeves*, 227 U. S. 625." 327

334 The referee recommends the payment of $2000 to Jacob A. Freedman, as attorney for Frank Fox, one of the receivers. Mr. Freedman was appointed under an ex parte order of this Court on November 20th, 1933, for the purpose of defending the proceedings instituted against Fox for his removal as receiver. Those proceedings were instituted on October 4th, 1933.

Though the order of retainer was dated November 20th, 1933, it provided:

> "That this particular order be considered
335 as nunc pro tunc as of the 4th day of October, 1933, the date when the order to show cause was duly served upon the aforesaid receiver."

If this matter were presented to me de novo, I should be obliged to deny the application for the reason that I do not find authority in the General Orders to warrant the granting of the relief sought. Such services were not rendered in conformity with General Order No. 44 of the United States Supreme Court, which reads:

> 336 "No attorney for a receiver or a trustee shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver of trustee, stating the name of the counsel whom he wishes to employ, the reason for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditor or any other parties of the

proceedings, and their respective attorneys. 337
If satisfied that the attorney represents no interests adverse to the receiver, trustee, or any creditor in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee shall have represented any interest adverse 338
to the receiver, trustee, or any creditor in any matter upon which he is employed for such receiver or trustee, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney."

See *In re Eureka Upholstery Co. Inc.*, 48 Fed. (2d) 95; *H. L. Stratton, Inc.*, 51 Fed. (2d) 984.
339
However, I am constrained by the order in the case, as the law of the case, and accordingly shall make some award to Mr. Freedman.

As to the amount of such allowance it must be measured by the services rendered for the particular purpose covered by the retainer. Fox's petition for the appointment of Mr. Freedman sets forth services rendered even prior to October 4, 1933, and Mr. Freedman's application for allowance cannot be read consistently with the Fox petition, at least in that respect. Many of

340 the matters set forth in Mr. Freedman's application for services rendered subsequent to October 4, 1933 were, according to the Fox affidavit, performed by Mr. Freedman prior to October 4th, 1933. That some meriforious service was rendered in the specific matter affecting Mr. Fox's status as receiver is undoubted, and under the order in the case, Mr. Freedman should be compensated therefor.

I set the award at $1000. If this is not adequate compensation for all the services rendered by Mr. Freedman to the receiver Fox, that is
341 a matter that may be an obligation of Mr. Fox, but not of the bankrupt's estate.

The application of Samuel M. Brook for an allowance for services rendered an objecting creditor was properly denied by the referee. Mr. Brook claims under Section 64(b) of the Bankruptcy Act (U. S. C. Title 11, Sec. 104), asserting that he succeeded in having the confirmation of the previous composition refused or set aside. The previous composition was modified, but not as a result of his efforts. From Judge Campbell's opinion, it appears that no specifications of such objections had been filed.

342 The report of the referee as to the other allowances is confirmed.

Motion to confirm granted. The report of the referee is confirmed except as to those modifications set forth herein.

Settle order on notice.

CLARENCE G. GALSTON,
U. S. D. J.

Petition of Eugene F. O'Connor, Jr., for Appeal and Order Allowing Appeal (District Court). 343

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt. 344

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petitioner, Eugene F. O'Connor, Jr., feeling himself aggrieved by the order made and entered by Hon. Clarence G. Galston, District Judge, on the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter in so far as same limits the statutory commissions of petitioner as Referee in Bankruptcy in the said 345
proceeding to the sum of $24,064.87, does hereby appeal from each and every part of said order of the Hon. Clarence G. Galston, District Judge, made and entered the 6th day of April, 1934, in so far as same fixes the said statutory commissions, to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error which are filed herewith, and he prays that this appeal may be allowed and that the transcript of the record of the proceedings and

Petition of Eugene F. O'Connor, Jr. for Appeal and Order Allowing Appeal.

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papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, April 10, 1934.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Petitioner,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

347

The foregoing appeal is hereby allowed.

Dated, Brooklyn, New York, April 13th, 1934.

CLARENCE G. GALSTON,
U. S. D. J.

348

Assignments of Error of Eugene F. O'Connor, Jr.

349

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

350

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Now comes the appellant, Eugene F. O'Connor, Jr., and respectfully files the following assignments of error claimed to have been committed by the Court below in the order made by Hon. Clarence G. Galston, District Judge, and entered the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter in so far as the said order limits the compensation of the said appellant as Referee in Bankruptcy in the said proceeding to the sum of $24,064.87:

351

1. That the Court erred as a matter of law in limiting compensation of the said appellant as Referee in Bankruptcy in the said matter to the sum of $24,064.87.

2. That the Court erred as a matter of law in failing to fix the compensation of

352 the said Referee in the said matter at the sum of $65,049.19.

3. That the Court erred in providing in the said order of confirmation as follows:

"ORDERED (10) that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17 * * * and the amount of compensation to which the Referee is entitled herein, is hereby fixed at the sum of $24,064.87, * * *."

353 4. That the Court erred in failing to find as a matter of law under the terms of the composition which contemplate 100% payment to creditors that within the intent and meaning of §40a (11 U. S. C. A. 68a) of the Bankruptcy Act,

"one-half of one percentum on the amount to be paid creditors upon the confirmation of a composition"

is to be computed in this case upon the total amount of claims filed, scheduled and allowed, namely, $13,008,038.30.

354 5. That the Court erred as a matter of law in holding with respect to the terms of the composition offer that "85% of the old debt persists", and that the said debt "is not discharged" and "survives in a modified form."

6. That the Court erred as a matter of law in holding with respect to the said terms of composition offer as follows:

"To assert that acceptance of the offer

of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the Court." 355

7. The Court erred as a matter of law in holding with respect to the said offer that:

"In all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition." 356

8. The Court erred as a matter of law on the question of the present market value of the modified bonds in giving any effect or consideration to the following affidavits sworn to on the dates indicated:

C. D. Pulis	March 22, 1934,
Milton Jacobs	March 23, 1934,
Arnold R. Hanson	March 22,. 1934,

or to any other affidavits filed on the same question.

9. The Court erred as a matter of law in ascribing any value to the said modified bonds other than the face amount thereof for the purpose of computing the Referee's commissions. 357

10. That the Court erred as a matter of law in holding that in a composition settlement where the consideration to be paid to creditors is in part represented by deferred installments, for the purpose of

358 computing Referee's commissions, the value of the said consideration is to be fixed at an amount less than the "amount to be paid to creditors."

11. That the Court erred as a matter of law in fixing the value of the said modified bonds at 22% instead of 85%, their face value.

12. That the Court erred as a matter of law in arriving at the said conclusion ex parte by consideration of affidavits and without taking independent testimony in 359 open court on the said question.

13. That the Court erred as a matter of law in fixing the value of the said bonds at the market value thereof "based on actual sales known to the affiants, brokers who deal in such securities."

14. That the Court erred as a matter of law in holding that *In re Batterman Co.*, 231 Fed. 699 (C. C. A. 2); *Kinkead* v. *J. Bacon & Sons, et al.*, 230 Fed. 362 (C. C. A. 6), have no relevancy to the issue at 360 bar.

15. That the Court erred as a matter of law in holding that "the question presented is, what is the fair market value of the securities."

16. The Court erred as a matter of law in holding *In re Mills Tea & Butter Company*, 235 Fed. 815, has "bearing in the present proceeding."

17. That the Court erred as a matter 361
of law in concluding:

"That the Referee's commissions must be figured on the basis of not 100% of $13,008,038.30 but only thirty seven (37%) percent of such sum (15% cash plus 22% as the cash value of the securities). His commission of one-half percent (½%) on that sum is $24,064.87."

WHEREFORE, Eugene F. O'Connor, Jr., appellant herein, prays that the order of Hon. Clarence G. Galston, District Judge of the United States District Court for the Eastern District of New York, dated the 6th day of April, 1934, be reviewed, revised, reversed and modified to the extent above indicated, and that the commissions of the Referee be stated in the sum of $65,049.19, and that the order of confirmation be modified accordingly. 362

Dated, New York, April 10, 1934.

EUGENE F. O'CONNOR, JR.,
Appellant.

(Verified by Eugene F. O'Connor, Jr., April 10th, 1934, before Laura Gottlieb, Notary Public.) 363

Order Granting Eugene F. O'Connor, Jr., Leave to Appeal (Circuit Court of Appeals).

364

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit held in the Courtrooms in the Post Office Building in the City of New York, on the 26th day of April, 1934.

Present—Hon. Learned Hand,
" Thomas W. Swan,
" Harrie B. Chase,

365

Circuit Judges.

In the Matter

of

Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

366

A motion having been made herein by counsel for the appellant for leave to appeal from a certain order of the District Court, dated April 6, 1934.

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

WILLIAM PARKIN,
Clerk.

Petition of Fred L. Gross for Appeal and Order Allowing Appeal (District Court). 367

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In Bankruptcy No. 24,860.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION, 368
Bankrupt.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petitioner, Fred L. Gross, feeling himself aggrieved by the order made and entered by Honorable Clarence G. Galston, District Judge, on the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter, in so far as said order fails adequately to protect 369
your petitioner, as receiver in bankruptcy in the said proceeding, with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the sum of $28,877.84, does hereby appeal from each and every part of said order of the Honorable Clarence G. Galston, District Judge, made and entered the 6th day of April, 1934, in so far as same fails to protect your petitioner, as receiver,

370 with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of error which are filed herewith, and he prays that this appeal may be allowed and that the transcript of the record of the proceedings and papers on which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for
371 the Second Circuit.

Dated, New York, April 12, 1934.

FRED L. GROSS,
Receiver of Realty Associates Securities Corporation, Bankrupt,
In Person,
Office and Post Office Address,
32 Court Street,
Borough of Brooklyn,
City of New York.

372 The foregoing appeal is hereby allowed.

Dated, Brooklyn, New York, April 12, 1934.

C. G. GALSTON,
U. S. D. J.

Assignments of Error of Fred L. Gross.

373

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter
of
REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

374

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Now comes the appellant, Fred L. Gross, and respectfully files the following assignments of error claimed to have been committed by the court below in the order made by Honorable Clarence G. Galston, District Judge, and entered the 6th day of April, 1934, confirming the composition in bankruptcy in the above entitled matter, in so far as the said order fails adequately to protect your petitioner, as receiver in bankruptcy in the said proceeding, with regard to any and all liability for federal and state taxes, and in so far as said order limits the commissions, as a matter of law, of your petitioner, as such receiver, to the sum of $28,877.84:

375

1. That the court erred in failing to retain jurisdiction to pass upon and determine any possible federal or state tax liability of the receiver.

376 2. That the court erred in only retaining, with regard to tax matters, jurisdiction to pass upon and determine the validity of and objection to the claims of the Collector of Internal Revenue for 1931 income taxes.

3. That the court erred in failing adequately to provide for the protection of the receiver with regard to any and all liability for federal and state taxes.

4. That the court erred, as a matter of law, in fixing compensation of the said appellant, as
377 receiver in bankruptcy in the said matter, at the sum of $28,877.84.

5. That the court erred, as a matter of law, in computing the compensation of the said receiver in the said matter on the basis of the so-called market value of bonds, which were part of the composition settlement.

6. That the court erred, as a matter of law, in failing to compute the compensation of the said receiver in the said matter, on the basis of
378 the face amount of bonds which form 85% of the consideration of the composition settlement.

7. That the court erred in providing in the said order of confirmation as follows:

> "ORDERED, (10) that the amount to be paid to creditors upon the confirmation of said composition is hereby found to be $4,812,974.17 * * * and the amount of compensation to which the Referee is entitled herein is hereby fixed at the sum

of $24,064.87, subject to being reduced by reason of claims objected to being reduced and disallowed; and it is further 379

"ORDERED, (11) that the Court hereby allows to the Receivers as compensation the total sum of $48,129.74 the same to be divided between them in the proportions of sixty per centum (60%) (viz. $28,877.84) to Fred L. Gross, as compensation for his services as Receiver, and forty per centum (40%) (viz. $19,251.90) to Frank Fox, as compensation for his services during the time when he served as Receiver," 380

8. That the court erred in failing to find, as a matter of law, that the terms of the composition contemplated one hundred per cent. payment to creditors and that, within the intent and meaning of Section 48 of the Bankruptcy Act (U. S. Code, Title 11, Ch. 5, Sec. 76), "one-half of one per centum of the amount to be paid creditors on such composition" is to be computed in this case upon the total amount of claims filed, scheduled and allowed, viz.: $13,008,038.30.

9. That the court erred, as a matter of law, 381 in holding with respect to the terms of the composition offer, to a limited extent, that "85% of the old debt persists", and that the said debt "is not discharged" and "survives in a modified form".

10. That the court erred, as a matter of law, in holding with respect to the said terms of composition offer as follows:

"To assert that acceptance of the offer of composition wipes out the old debt, be-

382 cause in terms it has not been but modified, is to deal with verbal niceties, which in no respect appeals to the conscience of the court."

11. That the court erred, as a matter of law, in holding with respect to the said offer that:

"In all good conscience, the present ascertainable value of the securities should be regarded as part of the payment made upon composition."

383 12. That the court erred, as a matter of law, with regard to present market value of the modified bonds, in giving any effect or consideration to the affidavits served on appellant after the hearing held on March 23, 1934, viz.: those of

C. D. Pulis, sworn to March 22, 1934,
Milton Jacobs, sworn to March 23, 1934, and
Arnold R. Hanson, sworn to March 22, 1934,

or to any other affidavits filed on the same question.

384 13. That the court erred, as a matter of law; in holding that in a composition settlement, where the consideration to be paid to creditors is in part represented by deferred obligations or installments for the purpose of computing receivers' commissions, the value of said consideration is to be fixed at an amount less than the face "amount to be paid to creditors".

14. That the court erred, as a matter of law,

in fixing the value of the said modified bonds at 385
22% instead of 85%, their face value.

15. That the court erred, as a matter of law, in arriving at the said conclusion ex parte by consideration of affidavits and without taking independent testimony in open court on the said question, if said question be held material and relevant.

16. That the court erred, as a matter of law, in fixing the value of the said bonds at the so-called market value thereof, based on some actual sales known to the brokers who executed such 386
affidavits and on said brokers' further opinion that after fifteen per cent. has been paid on account of principal and interest on said bonds, the bonds will decline in value from 37 to 22.

17. That the court erred, as a matter of law, in holding that *In re Batterman Co.*, 231 Fed. 699 (C. C. A. 2nd) and *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362 (C. C. A. 6th) have no relevancy to the issue at bar, and that *In re Mills Tea & Butter Co.*, 236 Fed. 815, has a bearing in the present proceeding. 387

18. That the court erred, as a matter of law, in concluding

> "That the referee's commissions must be figured on the basis of not 100% of $13,008,038.30 but only thirty seven (37%) percent of such sum (15% cash plus 22% as the cash value of the securities). * * * The allowance recommended by the referee are the subject of vigorous protest. The

388 real question involved is whether the receivers' compensation is to be based upon the entire amount of the composition or merely upon the cash payment. In this respect the receivers are in the same position as the referee, and should be compensated on the basis of the cash payment and the present market value of the securities retained. Accordingly, I find that the total amount to be allowed the receivers under the provisions of Section 76, subdivisions (d) and (e) is the sum of
389 $48,129.74, being 1% of the 15% paid in cash and the present value of the securities."

19. That the court erred, as a matter of law, in dividing commissions sixty per cent. to petitioner and forty per cent. to petitioner's former co-receiver, Mr. Frank Fox.

20. That the court erred, as a matter of law, in concluding:

"Mr. Gross served, roughly, nine months as receiver, as against six months service
390 by Mr. Fox. It becomes the duty of the Court to apportion the fees of the receivers. The referee in his recommendation followed a division of about sixty percent. to Mr. Gross, and forty percent. to Mr. Fox, and I see no reason for departing from that apportionment. Accordingly, Mr. Gross is awarded the sum of $28,877.84, and Mr. Fox $19,251.90."

21. That the court erred, as a matter of law,

in awarding Mr. Fox a commission, because of his failure to comply with general order XLII and Eastern District Bankruptcy Rule X in failing to set forth the amount claimed in his petition for allowance. 391

WHEREFORE, Fred L. Gross, appellant, in person herein, prays that the order of Honorable Clarence G. Galston, District Judge of the United States District Court for the Eastern District of New York, dated the 6th day of April, 1934, be reviewed, revised, reversed and modified to the extent above indicated; that adequate provision be made for the protection of the receiver with regard to any and all liability for federal and state taxes; and that the commissions of the said receiver be stated in the sum of $65,040.19, and that the order of confirmation be modified accordingly. 392

Dated, New York, April 12, 1934.

FRED L. GROSS,
Appellant in Person.

393

394 United States of America,
Eastern District of New York,
State of New York,
County of Kings—ss.:

FRED L. GROSS, being duly sworn, deposes and says:

That he is the appellant in person herein; that he has read the foregoing assignment of errors and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information
395 and belief, and that as to those matters he believes it to be true.

FRED L. GROSS.

Sworn to before me this
12th day of April, 1934.

JOHN P. STEPHENS,
Notary Public,
Kings County, N. Y.
Kings Co. Clk's No. 26, Reg. No. 6045.
N. Y. Co. Clk's No. 1038, Reg. No. 68595.
396 Queens Co. Clk's No. 317, Reg. No. 1989.
Nassau County Clerk's No. 6829.
Certificate filed in Suffolk Co.
Commission Expires March 30, 1936.

Order Granting Fred L. Gross Leave to Appeal (Circuit Court of Appeals).

397

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of April, one thousand nine hundred and thirty-four.

398

Present—HON. LEARNED HAND,
" THOMAS W. SWAN,
" HARRIE B. CHASE,
Circuit Judges.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

FRED L. GROSS, as receiver, etc.,
Appellant.

399

A motion having been made herein by counsel for the appellant for leave to appeal from a certain Order of the District Court dated April 6, 1934,

Upon consideration thereof it is

ORDERED that said motion be and hereby is granted.

WM. PARKIN,
Clerk.

Order Waiving Issuance and Service of Citations and Filing of Bonds on Appeal.

400

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held in the Courtroom of the Post Office Building in the City of New York, on the 27th day of April, 1934.

Present—Hon. Martin T. Manton,
" Learned Hand,
" Thomas W. Swan, *Circuit Judges.*

401

In the Matter
of
Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

Eugene F. O'Connor, Jr., having heretofore filed appeals to this Court, upon reading and filing the annexed stipulation dated the 20th day of April, 1934, it is now

402 Ordered that in connection with the said appeals, the issuance and service of citations of appeal and the filing of bonds on appeal be and the same hereby are waived and it is further

Ordered that the appearances of the parties enumerated in the annexed stipulation by their respective counsel, be and the same hereby are noted in this Court.

LEARNED HAND,
C. J.

Similar order dated April 20th, 1934, was entered in this court by Learned Hand, *C. J.*, with respect to appeals taken by Fred L. Gross, Receiver.

Order Consolidating Appeals.

403

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held in the Courtrooms of the Post Office Building in the City of New York, on the 2nd day of May, 1934.

Present—Hon. Martin T. Manton,
" Learned Hand,
" Thomas W. Swan,
Circuit Judges.

404

In the Matter

of

Realty Associates Securities Corporation,
Bankrupt.

Eugene F. O'Connor, Jr.,
Appellant.

405

Eugene F. O'Connor, Jr., having heretofore filed appeals to this court, upon reading and filing the annexed stipulation dated the 26th day of April, 1934, it is now

Ordered that in connection with the said appeal taken by Eugene F. O'Connor, Jr. by order of Hon. Clarence G. Galston, dated April 13, 1934 and the appeal taken by leave of this court by

406 order dated April 26th, 1934, be and the same hereby are consolidated and the said appeals shall be heard by this court together on the one record herein, and it is further

ORDERED that the Clerk of this Court is hereby directed to accept for filing one record herein consolidating the aforesaid appeals.

MANTON,
C. J.

407 Similar order dated April 30th, 1934, was entered in this court by Martin T. Manton, *C. J.*, with respect to appeals taken by Fred L. Gross, Receiver.

Statement as to Consolidated Appeals.

Pursuant to order of this Court dated May 4th 1934, entered by Martin T. Manton, *C. J.*, the appeals taken herein respectively by Eugene F. O'Connor, Jr., appellant and Fred L. Gross, appellant were consolidated for the purposes of the
408 record on appeal, so that one transcript of record may be filed for all of said appeals.

Stipulation Extending Time to File Consolidated Record on Appeal.

409

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, 410
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 411
Appellees.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the time of appellants

Stipulation Extending Time to File Consolidated Record on Appeal.

412

herein to prepare and file the printed consolidated record on appeal be and it hereby is extended to and including October 8th, 1934.

Dated, September 17th, 1934.

ALFRED T. DAVISON,
Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,
2396 Third Avenue,
New York City.

413

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,
261 Broadway,
New York City.

ALMON G. RASQUIN,
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
414 Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees,
36 West 44th Street,
New York City.

Stipulation Extending Time to File Consolidated Record on Appeal.

415

JAMES N. ROSENBERG,
Attorney for Realty Associates, Inc., Appellee,
165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust Company, Appellee,
165 Broadway,
New York City.

416

WILLIAM R. BAYES,
Attorney for Bondholders Committee, of which Frederick S. Robinson is Chairman, Appellees,
41 Broad Street,
New York City.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,
225 Broadway,
New York City.

417

FRED L. GROSS,
Receiver-Appellant, in person, and Appellee in the appeal of Eugene F. O'Connor, Jr.,
32 Court Street,
Brooklyn, New York.

So ordered.

MANTON,
C. J.

Stipulation as to Trust Indenture.

418

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,

Bankrupt.

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419 IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, that, the Trust Indenture dated as of July 10th, 1933 between Realty Associates Securities Corporation and Manufacturers Trust Company, as Trustee, need not be prinfed in said transcript of record and copies thereof may be handed to the Court upon the argument of said appeal to be considered in connection therewith.

Dated, New York, October 6th, 1934.

ALFRED T. DAVISON,

420 Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,

2396 Third Avenue,
New York City.

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,

261 Broadway,
New York City.

ALMON G. RASQUIN, 421
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees, 422
36 West 44th Street,
New York City.

JAMES N. ROSENBERG,
Attorney for Realty Associates, Inc., Appellee,
165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust Company, Appellee, 423
165 Broadway,
New York City.

WILLIAM R. BAYES,
Attorney for Bondholders Committee, of which Frederick S. Robinson is Chairman, Appellees,
41 Broad Street,
New York City.

424 KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,
225 Broadway,
New York City.

FRED L. GROSS,
Receiver-Appellant, in person, and Appellee in the appeal of Eugene F. O'Connor, Jr.,
32 Court Street,
Brooklyn, New York.

So ordered:

425

MANTON,
C. J.

426

Stipulation as to Record.

UNITED STATES CIRCUIT COURT OF APPEALS, 427

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, 428
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 429
Appellees.

IT IS HEREBY STIPULATED AND AGREED by the undersigned that the foregoing is a true tran-

430 script of the record of the said District Court proceedings in the above entitled matter as agreed upon between the attorneys for the respective parties.

Dated, New York, October 6th, 1934.

ALFRED T. DAVISON,
Attorney for Realty Associates Securities Corporation, Bankrupt-Appellee,
2396 Third Avenue,
New York City.

431

SAMUEL M. BROOK,
Attorney for Homer E. Palmer, et al., Appellees,
261 Broadway,
New York City.

ALMON G. RASQUIN,
Collector of Internal Revenue, Appellee,
Federal Building,
Brooklyn, New York.

ARCHIBALD M. PALMER,
432 Attorney for Eliza B. Carman, et al., Appellees,
2 Lafayette Street,
New York City.

COLBY, BROWN & POLLACK,
Attorneys for Bondholders Committee, of which William E. Kennedy, Jr. is Chairman, Appellees,
36 West 44th Street,
New York City.

JAMES N. ROSENBERG, 433
Attorney for Realty Associates, Inc.,
Appellee,

165 Broadway,
New York City.

NEWMAN & BISCO,
Attorneys for Manufacturers Trust
Company, Appellee,

165 Broadway,
New York City.

WILLIAM R. BAYES,
Attorney for Bondholders Commit- 434
tee, of which Frederick S. Robinson is Chairman, Appellees,

41 Broad Street,
New York City.

KRAUSE, HIRSCH & LEVIN,
Attorneys for Eugene F. O'Connor, Jr., Appellant,

225 Broadway,
New York City.

FRED L. GROSS, 435
Receiver-Appellant, in person, and
Appellee in the appeal of Eugene
F. O'Connor, Jr.,

32 Court Street,
Brooklyn, New York.

So ordered.

MANTON,
C. J.

Order Settling and Filing Record

436

At a Stated Term of the United States District Court held in and for the Eastern District of New York at the Post Office Building, Washington and Johnson Streets in the Borough of Brooklyn, City of New York, on the day of October, 1934.

Present—Hon. Clarence E. Galston,
District Judge.

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437 In the Matter
of
Realty Associates Securities Corporation,
Bankrupt.

Fred L. Gross, as Receiver, etc.,
Appellant,

Realty Associates Securities Corporation, Bankrupt; Homer E. Palmer, et al.; Collector of Internal Revenue; Eliza B. Carman, et al.; Bondholders Committee of which William E. Kennedy, Jr. is Chairman; Realty Associates, Inc.; Manufacturers Trust Company; Bondholders Committee of which Frederick S. Robinson is Chairman,
438
Appellees.

Eugene F. O'Connor, Jr.,
Appellant,

Realty Associates Securities Corporation, Bankrupt; Homer E. Palmer, et al.; Collector of Internal Revenue; Eliza B. Car-

MAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman; FRED L. GROSS, Receiver, 439

Appellees.

Upon the above stipulation the foregoing record contains all the papers on appeal, and it is hereby settled and ordered on file as the record on appeal herein and the Clerk of this Court is directed to certify the record herein. 440

Enter,

CLARENCE E. GALSTON,
U. S. D. J.,
for the Eastern District.

441

Clerk's Certificate.

442 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

FRED L. GROSS, as Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION,
443 Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman;
Appellees.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt; HOMER E. PALMER, et al.; COLLECTOR OF INTERNAL REVENUE; ELIZA B. CARMAN, et al.; BONDHOLDERS COMMITTEE of which WILLIAM E. KENNEDY, JR. is Chairman; REALTY
444 ASSOCIATES, INC.; MANUFACTURERS TRUST COMPANY; BONDHOLDERS COMMITTEE of which FREDERICK S. ROBINSON is Chairman, FRED L. GROSS, Receiver,
Appellees.

United States of America,
Eastern District of New York—ss.:

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the

Clerk's Certificate.

Eastern District of New York, do hereby certify 445
that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter, as ordered filed by the Court.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Eastern District, this day of October in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the said United States the one hundred and fifty-ninth.

PERCY G. B. GILKES, 446
Clerk.

(Seal)

447

Prevailing Opinion by Chase, *C. J.*

UNITED STATES CIRCUIT COURT OF APPEALS, 451

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt.

EUGENE F. O'CONNOR, JR.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, FRED L. GROSS, HOMER E. PALMER, et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS' COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is Chairman, 452
Appellees.

FRED L. GROSS, Receiver, etc.,
Appellant,

REALTY ASSOCIATES SECURITIES CORPORATION, HOMER E. PALMER et al., ALMON G. RASQUIN, ELIZA B. CARMAN et al., BONDHOLDERS COMMITTEE of which William E. Kennedy, Jr., is Chairman, REALTY ASSOCIATES, INC., MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which Frederick S. Robinson is chairman, 453
Appellees.

Before—MANTON, AUGUSTUS N. HAND and CHASE, *Circuit Judges.*

From an order of the District Court confirming an offer in composition, made by a bankrupt and

454 accepted by a majority in number and amount of its creditors, fixing the compensation of the referee and of two receivers, the referee and one receiver were granted leave to appeal and did appeal both by leave and as of right. Affirmed in part and reversed in part.

JAMES N. ROSENBERG, ESQ.,
for Realty Associates, Inc.

ALFRED T. DAVISON, ESQ.,
for Realty Associates Securities Corp.,
Appellee, Alfred T. Davison, Esq.,
455 Orrin G. Judd, Esq., of Counsel.

HUGHES, SCHURMAN & DWIGHT, ESQS.,
for Fred L. Gross, and Eugene F. O'Connor, Jr., Referee. Curtis Ely Frank, of Counsel.

KRAUSE, HIRSCH & LEVIN, ESQ.,
for Referee-Appellant, George C. Levin, of Counsel.

CHASE, *Circuit Judge*:

456 The appeals in this cause have been consolidated and will be so treated herein.

Realty Associates Corporation filed its voluntary petition in bankruptcy in the District Court for the Eastern District of New York on July 10, 1933 and was adjudicated a bankrupt on that day and the cause referred to the referee. At the same time Fred L. Gross and Frank Fox were appointed receivers. They qualified as such and conducted the business of the bankrupt until January 4, 1934 when Fox resigned. Thereafter Gross as sole receiver carried on the bankrupt's business.

The bankrupt corporation had done a large busi-

ness in real estate mortgages and in installment 457
sales contracts. It owned real estate, cash and securities. Its debts consisted largely of bonds it had issued which were secured by three mortgages to the Manufacturers Trust Company as trustee although it owed other debts to the amount of $208,133.90 when its petition was filed.

It made an offer in composition which was accepted by a majority of its creditors in number and amount but that was not confirmed and on appeal to this court the order of the district court was affirmed. In *Re Realty Associates Corporation*, 69 Fed. (2) 41. Thereupon the offer in com- 458
position was modified, accepted and confirmed. The referee and the receiver, Gross, alone have appealed and the only questions presented relate to the correctness of the order respecting their compensation and the adequacy of the order to protect the receiver from personal liability on tax claims.

The composition offer accepted and confirmed provided that

> "1. All debts which have priority shall be paid in full. 459
>
> * * * * * * *
>
> "3. The amount to be paid to all creditors whose claims are based on presently outstanding bonds of Realty Associates Securities Corporation, and whose claims have either been filed or allowed or are included in the schedules filed by the bankrupt (claims of such creditors to be stated as of July 10, 1933), shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed or if not filed and

460 allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedule in bankruptcy filed herein. The remaining eighty-five per cent. of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided.

The amounts of any coupons due prior to April 1, 1933, which are or were attached to the presently outstanding bonds of the Company shall not be included in the com-
461 putation of any claim for the purposes of this composition, but such coupons shall be paid in full from the sums heretofore deposited with the respective paying agents."

* * * * * * *

"5. The amount to be paid to all creditors (not entitled to priority) whose claims are not based upon presently outstanding bonds of Realty Associates Securities Corporation, shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed, or if not filed and allowed, then
462 fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein, and at the time of such payment such creditors shall also receive presently outstanding bonds now in the treasury of Realty Associates Securities Corporation issued under the indenture above mentioned dated October 1, 1928 (reduced and modified in the same manner as the presently outstanding bonds as provided in subdivision 4 hereof and as hereinafter provided) equal in such reduced

face amount to 85% of the amount of their 463
said claims on which said 15% payment in cash is computed."

The modification, so far as now important, of the bonds which represented 85% of the indebtedness to be paid by the bankrupt made the due date of all of them October 1, 1943, changed the rate of interest from 6% to 5% per annum; and reduced the principal to 85% of the original amount. The modified offer of composition contained detailed provisions calculated to protect the bond holders in their right to receive or en- 464
force payment of the bonds.

The total amount of the claims covered by the offer was $13,008,038.30. The court allowed the referee one half of 1% of the fifteen per cent of this amount which was to be paid in cash and one half of 1% of the present value of the 85% in bonds which he found amounted together to $4,812,974.17. The referee claimed an allowance computed on the entire amount of the indebtedness insisting that the offer in composition was to pay that in full while the appellees claim that only the 15% in cash was the amount to be paid on which the fee of the referee may be computed. 465
Yet they did not appeal and now urge the affirmance of the order on the ground that, as no greater allowance can lawfully be made in any event, the referee has not been harmed.

The compensation of Referees is only what the Bankruptcy Act allows. The provision for it is found in Sec. 40a of the Act as amended (11 U. S. C. A. Sec. 68a). So far as here applicable it provides:

"Sec. 40. Compensation of referees—a.

466 Referees shall receive as full compensation for their services, payable after they are rendered, * * * one half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition."

What is meant by "amount to be paid" is not confined to cash but includes whatever the composition agreement provides for. *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362. The composition agreement is a bargain which the bankrupt makes with his creditors to release his property from creditors' claims and secure his own discharge
467 in return for the "amount to be paid" which he has offered and which has been accepted by sufficient creditors and approved by the court as the Act requires. *Myers* v. *Internat. Trust Co.*, 273 U. S. 380. Where the bankrupt's payment is all in cash no difficulty can arise in computing the compensation of the referee. If property in kind should be the subject matter of the offer in whole or in part some means would have to be found for determining the statutory fee of the referee and whether or not that would take the form of finding the value in money of the property to be
468 turned over to creditors and taking the proper percentage of that need not now be decided. This appeal requires a decision only on the present facts which show that we are dealing only with a situation where the amount to be paid is part cash and part in promises to pay contained in bonds of the bankrupt in terms payable in cash in the future. These bonds are in large part physically the same bonds which the creditors held before the composition but because of the composition agreement they are to be altered in

material respects by changing the principal 469
amount, the interest rate, and the due date, they are in law new obligations enforceable only in accordance with the new promise they contain which has superseded the old one. When the holders turn them in and receive them back so altered they have their old securities no more than they would have if the old pieces of paper were not returned altered by a rider attached but instead new bonds were issued in exchange for the old. So the amount to be paid in composition in so far as the payment is in bonds stands the same as to the old holders of securities 470
and those who receive treasury bonds not previously issued.

That the debts other than those agreed to be paid by the terms of the composition are discharged by the composition is clear, *Nassau Smelting & Refining Co.* v. *Brightwood Bronze Foundry Co.*, 265 U. S. 269; *In Mirkus*, 289 Fed. 732; and it is settled that the effect of the discharge is to destroy the remedy but not the indebtedness. *Zerelo* v. *Reeves*, 227 U. S. 625. Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed com- 471
position offer the obligation of the old bonds was by agreement destroyed and surplanted by the new.

This court has held that where a composition took place on the basis of an offer to pay 65% of the indebtedness in cash and certain creditors, subsequently agreed to and did accept in lieu of the offer 15% in cash and 85% of their claims in notes of a third party the amount actually

472 paid was to be treated as the equivalent of the offer of 65% in cash which was taken to be the amount to be paid upon composition for the purpose of computing the compensation of the referee. *In re H. Batterman Co.*, 231 Fed. 699. This shows that the amount agreed to be paid, not necessarily what is actually paid, is the amount upon which the referee's compensation is computed. To the same effect are *In re Mills Tea & Butter Co.*, 235 Fed. 815, and *Kinkead* v. *J. Bacon & Sons*, *supra*. The composition, when the order of confirmation becomes final, establishes the
473 rights of all concerned to the same effect when the composition offer includes promises of deferred payment which are not kept as when they are. *In re Mirkus*, *supra*. Nor does the compensation of the referee depend upon the fulfillment of such promises. *In re H. Batterman & Co.*, *supra*.

From what has been said it follows that, although the composition offer did not verbally take such form, it was in substance an offer to pay all creditors, not entitled to priority, 15% of their claims in cash and 85% of their claims by
474 giving them new obligations for that amount payable Oct. 1, 1943. The offer was to give the obligation of the bond and that obligation contained the promise to pay. By making this offer and promising to pay such claims in full the bankrupt set the amount to be paid upon composition subject only to acceptance by the necessary creditors and confirmation by the court. The effort of the court below to put a present value upon the bankrupt's promise to make the deferred payments by finding the present worth of the bonds made

the compensation of the referee dependent upon 475
whatever might be the prevailing competent opinion as to the likelihood of the bankrupt's making the future payments as agreed. This was doing by indirection what is contrary to our decision *In re H. Batterman Co., supra*, and making the amount of the referee's compensation contingent upon the probability of the fulfillment of the bankrupt's promises to make the deferred payments.

While it might be well by statute to give the court some discretion in fixing the compensation 476
of a referee as was suggested in *In re Columbia Cotton Oil & Provision Corporation*, 210 Fed. 824, it is impossible now to do anything but allow the arbitrary amount computed as the statute requires whether in given instances that be more or less than is reasonable. *Kinkead* v. *J. Bacon & Sons, supra; McMillan* v. *U. S. Fidelity & Guaranty Co.*, 22 Fed. (2) 135. In this instance the referee was entitled to have his compensation based on the entire amount promised to be paid.

The receivers conducted the business of the bankrupt for a time and were entitled to com-
pensation as allowed by the court under Sec. 48 477
(d) (e) of the Act. Where there is a confirmation of a composition the compensation allowed under subdivision (d) of Sec. 48 may not exceed one-half of one per centum of the amount to be paid creditors on composition and the additional allowance under subdivision (e) of Sec. 48 is limited to another one-half of one per centum of the same amount. Unlike the compensation of a referee that of a receiver is to be determined in the sound discretion of the court subject to

478 the limitation stated. The compensation of the receiver who has appealed was within such limits. Although the court was in error regarding the amount to be paid on composition and did allow the receivers the maximum commissions it could, when computed according to its conception of that amount, we find no reason for believing that any greater allowance would otherwise have, or ought to have, been made. The allowance seems to us to have been ample compensation for the services performed. Moreover, it is what the court saw fit to allow and as there was no abuse of discretion the allowance should stand.

479 The remaining question on the receiver's appeal relates to his possible personal liability for taxes for 1933 and 1934. We do not know what, if any, taxes there are for the payment of which the appealing receiver may be held personally liable. The order provided for the payment of all taxes; barred all liability of the receiver for their payment and jurisdiction was retained for the purpose, among others, of "the making of such other and further orders respecting the distribution of the consideration of the composition and the carrying out of said offer of composition,

480 * * *, as may be necessary or appropriate." So far as this record shows no further protection is needed.

Order modified in accordance with this opinion, *J.* A. N. Hand dissenting in part.

Dissenting Opinion by A. N. Hand, *C. J.*

481

UNITED STATES CIRCUIT COURT
OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR. and FRED L. GROSS,
Appellants, 482

REALTY ASSOCIATES SECURITIES CORPORATION,
REALTY ASSOCIATES, INC., et al.,
Appellees.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting in part):

I agree with the majority opinion as to the disposition of the appeal by Mr. Gross, but dissent from the ruling as to the commissions claimed by the referee in bankruptcy Mr. O'Connor. It seems 483
to me that we have been referred to no authority that in any way disturbs the decision of Judge Galston as to the basis for fixing the referee's commissions and that his conclusion was inevitable because of the express terms of the Bankruptcy Act. It is perfectly true that referees' commissions have ordinarily been figured upon the par value of notes that have been offered by a bankrupt in a composition, but I do not find that the point that they should be valued has ever been raised and, in the absence of an objec-

484 tion, it may have been quite proper to value them at the face amount where no other value was suggested.

The material portion of Section 40 (a) which regulates referees' compensation is the following:

> "Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

485 I cannot see how "the amount to be paid to creditors upon the confirmation of the composition" means anything but the value of the property (in this case bonds of the bankrupt) which the creditors are to receive at the time when the order of confirmation is made. Any other interpretation puts form above substance and ignores reality.

Our decision in *In re H. Batterman*, 231 Fed. 699, is thought to be contra, but I cannot see that it is opposed to my view. In that case a composition was offered by the bankrupt-corporation
486 of 65 per cent in cash. Some of the creditors offered to waive a deposit of cash and to take instead 15 per cent in cash furnished by H. B. Claflin Corporation and 85 per cent in notes of another company indorsed by Claflin. We affirmed the court below in holding that the alternative offer made in consideration of the waiver of the deposit of 65 per cent in cash was to be considered as the equivalent of the latter amount and allowed the referee commissions as though the 65 per cent in cash had been deposited. The decision seems in accord with that of Judge Galston in the case at

bar for it involved valuing the 15 per cent of cash 487
and the 85 per cent in notes at 65 per cent in cash and calculating the commissions on the latter sum.

The decision of Judge Morton in *In re Mills Tea & Butter Co.*, 235 Fed. 815, was to the same effect as *In re Batterman, supra.* He valued an offer of 100 per cent in stock of a new corporation, offered as an alternative option for 25% in cash, as the equivalent of the latter and allowed commissions to the referee on the latter sum.

Kinkead v. J. Bacon & Sons, 230 Fed. 362, is 488
another decision by a distinguished court thought to be contra to the ruling of the court below, but it merely held that a waiver by certain creditors of the deposit of cash to be paid on a composition would not affect the right of the referee to commissions on such sums.

There can be no doubt that the referee in receiving commissions as figured by the court below received his statutory percentage on the value of the amount "to be paid to creditors" at the time of the confirmation of the composition. This, rather than a compensation calculated on an il- 489
lusory basis that has no relation to market values, seems if not absolutely required by the statute certainly in accordance with a just and reasonable construction of it.

In my opinion the order of the court below should be in all respects affirmed.

Order for Mandate.

490

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 10th day of December, one thousand nine
491 hundred and thirty-four.

Present—HON. MARTIN T. MANTON,
" AUGUSTUS N. HAND,
" HARRIE B. CHASE,
Circuit Judges.

In the Matter

of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,
492

EUGENE F. O'CONNOR, JR., FRED L. GROSS,
as Receiver, etc.,
Appellants.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the

Order for Mandate.

United States for the Eastern District of New York, and was argued by counsel. 493

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and hereby is modified in accordance with the opinion of this Court. Costs of this Court to the Referee appellant against the appellees and to the appellees against the Receiver appellant.

IT IS FURTHER ORDERED that a mandate issue to the said District Court in accordance with this decree. 494

WM. PARKIN,
Clerk.

495

Clerk's Certificate.

496

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

In the Matter

497 of

REALTY ASSOCIATES SECURITIES CORPORATION,
Bankrupt,

EUGENE F. O'CONNOR, JR., FRED L. GROSS,
as Receiver, etc.,
Appellants.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of
498 New York, in the Second Circuit, this 28th day of December, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

WM. PARKIN,
Clerk.

(Seal)

[fol. 167] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.